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IN THE

Supreme Court of the United States

GREGORY P. SHELTON, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court should grant *Chevron* deference to an agency's interpretation of its own jurisdiction.

2. Whether a district court's discretion under Rule 39(b) should be limited such that the court should permit a jury trial unless compelling reasons exist not to do so.

RULE 14.1(b) AND 29.6 STATEMENT

Petitioners are Shelton Wholesale, Inc.; Polaris Fireworks, Inc.; Gregory P. Shelton; and the National Fireworks Association, Ltd. No petitioner has a parent corporation, and no publicly held company owns ten percent (10%) or more of any petitioner's stock. Respondents are the United States Consumer Product Safety Commission; Thomas Moore, Acting Chairman, United States Consumer Product Safety Commission; and Eric B. Ault, Director, Central Regional Center, United States Consumer Product Safety Commission.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Gregory P. Shelton, Shelton Wholesale, Inc., Polaris Fireworks, Inc., and the National Fireworks Association, Ltd., petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 277 F.3d 998 and reprinted at Pet. App. 1a. The Order of the United States District Court for the Western District of Missouri issued January 30, 2001, is unreported and reprinted at Pet. App. 24a. The district court order issued September 21, 1999, is reported at 1999 WL 825483 and reprinted at Pet. App. 26a. The district court order issued January 6, 1999, is reported at 34 F. Supp. 2d 1147 and reprinted at Pet. App. 36a. The district court order

issued May 1, 1998, is unreported and reprinted at Pet. App. 82a. The district court order issued April 28, 1998, is reported at 1998 WL 251273 and reprinted at Pet. App. 84a.

JURISDICTION

The Court of Appeals entered judgment on January 23, 2002, and denied petitioners' petition for rehearing and suggestion of rehearing *en banc* on March 29, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Pertinent provisions of the Federal Hazardous Substances Act, 15 U.S.C. § 1261(q)(1)(B) (2002), and the Consumer Product Safety Commission regulations, 16 CFR § 1500.3(c)(10)(i) (2002), are set forth at Pet. App. 118a and Pet. App. 119a.

STATEMENT

1. Petitioners Shelton Wholesale, Inc., Polaris Fireworks, Inc. (the "Shelton corporate parties"), and Gregory P. Shelton ("Shelton") import fireworks to the United States. Shelton is president of the Shelton corporate parties. The National Fireworks Association, Ltd. ("NFA"), is a non-profit trade association comprised of several hundred fireworks companies and enthusiasts.

On October 2, 1996, the United States filed suit against the Shelton corporate parties. The government claimed the Shelton corporate parties had imported fireworks that were

defective according to regulations the Consumer Product Safety Commission ("Commission") promulgated under the Federal Hazardous Substances Act ("Act"). Petitioners, in turn, filed suit against the United States and the Commission, seeking a declaratory judgment that, among other things, the Commission has no jurisdiction under the Act to regulate common fireworks.

2.a. *The District Court's Rulings on the Commission's Jurisdiction.* Petitioners argued to the district court that the Act grants jurisdiction to the Commission to regulate only those substances that are used "in the household." 15 U.S.C. § 1261(q)(1)(B). Petitioners explained that common fireworks are used outside a household, not inside, and thus the Commission lacks jurisdiction under the Act to regulate common outdoor fireworks.

On April 28, 1998, the United States District Court for the Western District of Missouri ruled on summary judgment that the Act grants the Commission jurisdiction generally over common fireworks that are hazardous. Pet. App. 84a. The district court reserved for trial the factual issue of whether the Shelton parties' fireworks that the Commission sought to ban were hazardous substances under the Act.

On January 6, 1999, at the conclusion of a bench trial, the district court ruled that the Shelton parties' fireworks were banned hazardous substances under the Act. Pet. App. 36a. The court held that "the CPSC is entitled to a substantial amount of deference in interpreting the regulations and implementing their objectives." Pet. App. 49a. The court assessed a $100,000 fine against Shelton Wholesale, Inc. On September 21, 1999, the district court granted the United States summary judgment against Shelton, based on the court's prior ruling that the Shelton corporate parties had violated the Act. Pet. App. 26a.

b. *The District Court's Denial of the Shelton Corporate Parties' Request for Jury Trial.* Prior to trial, the district court ruled that the Shelton corporate parties were not entitled to a jury trial. The government originally brought suit against only the Shelton corporate parties. On May 20, 1997, the government filed a second amended complaint for the purpose of adding Shelton individually to the-litigation. On June 11, 1997, all three Shelton parties answered the second amended complaint and for the first time demanded a jury trial.

The government filed its motion to cancel the jury on April 20, 1998, more than ten months after the Shelton corporate parties made their request for a jury trial and just three weeks before trial was scheduled to begin. On May 1, 1998, nearly the eve of trial, the district court ruled the Shelton corporate parties had no right to a jury trial. Pet. App. 82a.

3. The Eighth Circuit affirmed the district court's rulings that (i) the Commission has jurisdiction under the Act to regulate common outdoor fireworks and (ii) the Shelton corporate parties should not be granted a jury trial. Rejecting petitioners' argument that the Commission's jurisdiction is limited to regulating substances that are used indoors, the Eighth Circuit deferred to the Commission's regulation that grants the Commission jurisdiction over items that are used outside the household. Pet. App. 12a n.4 (*citing* 16 C.F.R. § 1500.3(c)(10)(i)).

The Eighth Circuit further found the Shelton corporate parties waived their right to a jury trial because they did not demand one until they filed their answer to the second amended complaint. Pet. App. 21a. That complaint, the Eighth Circuit found, added Gregory Shelton as a defendant but raised no new issue against the corporate parties. *Id.* The Eighth Circuit found that the district court did not err in declining relief from the waiver under Rule 39(b) of

the Federal Rules of Civil Procedure. The Eighth Circuit reasoned that "the corporate parties offered no justification for their failure to timely demand a jury trial." Pet. App. 21a.

REASONS FOR GRANTING THE WRIT

This case presents two distinct issues, both of which warrant this Court's review. First, it presents the question whether a court should grant *Chevron* deference to an agency's interpretation of its own jurisdiction. That question has confounded the lower courts since this Court decided *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984), and has provoked individual members of this Court to offer divergent views on the issue. Second, this case presents the issue of what standards should guide a district court's discretion in considering a request for a jury trial under Rule 39(b)—a question raising fundamental concerns under the Seventh Amendment. Both questions present important and recurring issues of federal law on which the circuits are deeply divided, and this case is an appropriate vehicle for the Court to provide long-needed guidance in these areas.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER WHETHER AN AGENCY'S INTERPRETATION OF ITS OWN JURISDICTION WARRANTS *CHEVRON* DEFERENCE

The circuits are in deep conflict and disarray over whether a court should grant deference to an agency's interpretation of its own jurisdiction. The Eighth Circuit here deferred compliantly to the Commission's view of its jurisdiction. The Second and Ninth Circuits also follow that approach. In sharp conflict with the Eighth, Second and Ninth Circuits, other circuits, including the Third, Fourth and Seventh, flatly reject the notion that *Chevron* deference automatically applies to an agency's jurisdictional interpretations. But even those

circuits, while agreeing that automatic *Chevron* deference is inappropriate, disagree over the level of scrutiny a court should apply to an agency's jurisdictional interpretations.

This indisputably is an important and recurring issue of federal law. Indeed, its resolution often dictates the outcome of litigation and the reach of an agency's regulatory authority. As courts and commentators repeatedly have recognized, the division and disarray among the circuits on this issue have festered for years. Because this Court has never resolved the issue, those conflicts continue to deepen, as demonstrated by the fact that the Seventh and Eighth Circuits recently have issued squarely conflicting decisions. This Court's guidance alone can provide uniformity to this core administrative law issue. Moreover, the Eighth Circuit's decision, in its analysis and its outcome, is wrong. This Court should grant the writ to resolve the confusion surrounding this important and recurring issue and to correct the lower court's erroneous decision.

A. The Conflict Among the Circuits

1. The Eighth Circuit rejected Shelton's argument that the Commission lacks jurisdiction under the Federal Hazardous Substances Act to regulate common outdoor fireworks. Pet. App. 12a n.4. In reaching this conclusion, the Eighth Circuit cited to nothing but the Commission's regulation that generously interprets its jurisdiction under the Act. *Id.* (citing 16 C.F.R. 1500.3(c)(10)(i)). In the Eighth Circuit's judgment, the Commission's interpretative regulation ended any question regarding the scope of the Commission's jurisdiction over outdoor products under the Act. Based on the Commission's regulation, the Eighth Circuit concluded that the Commission has jurisdiction to regulate substances both inside and outside the household. Thus, the Eighth Circuit accorded complete deference to the Commission's views of its own jurisdiction. *Id.*

Joining the Eighth Circuit in its approach are the Second and Ninth Circuits. Like the Eighth Circuit, the Second Circuit rejects the principle that "less deference is owed to agency determinations that expand an agency's jurisdiction." *Connecticut v. United States Dep't of Interior*, 228 F.3d 82, 93 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001). The Second Circuit instead applies full *Chevron* deference to an agency's jurisdictional determinations. The Ninth Circuit likewise accords *Chevron* deference to an agency's determinations of the scope of its jurisdiction. *See Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 41 (2001) ("Given the deference that the agency's determination of its own jurisdiction is due, the Corps' decision to limit its review to the specific activity requiring the permit is not arbitrary or capricious.").

2. In sharp conflict with the Second, Eighth, and Ninth Circuits, other courts do not automatically grant *Chevron* deference to an agency's jurisdictional determinations. But even among the circuits that engage in a more searching review of an agency's determinations of its jurisdiction, there is deep disagreement over what the standard should be.

The Seventh Circuit, for example, recently reaffirmed that it reviews *de novo* an agency's jurisdictional determinations. *Northern Ill. Steel Supply Co. v. Sec'y of Labor*, No. 01-1752, 2002 WL 1339103, at *2 (7th Cir. June 20, 2002). In so holding, the Seventh Circuit acknowledged that the circuits are split on this unresolved issue. *Id.* As the Seventh Circuit correctly explained, "several other circuits have granted deference to an agency's determination of its own jurisdiction [and] the Supreme Court has not definitively ruled on the issue." *Id.* Recognizing that still other circuits do not grant *Chevron* deference to an agency's jurisdictional determinations, the Seventh Circuit held "that *de novo* review is appropriate." *Id. See also United Transp. Union-Illinois*

Legislative Bd. v. Surface Transp. Bd., 183 F.3d 606, 612 (7th Cir. 1999) ("[A]n agency's determination about the scope of its own jurisdiction indeed does receive *de novo* review and not *Chevron* deference.").

The Fourth Circuit takes an entirely different approach, charting for itself something of a middle course. When Congress is silent or has left an ambiguity over the scope of an agency's jurisdiction, the Fourth Circuit affords *Chevron* deference to an agency's jurisdictional interpretations in some but not all circumstances. Deference is warranted, according to the Fourth Circuit's formulation, "for an agency's determination of its own jurisdiction when that determination turns on the agency's findings of fact." *Bd. of Governors of the Univ. of N.C. v. United States Dep't of Labor*, 917 F.2d 812, 816 (4th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991). But *Chevron* deference is unwarranted "when the question before an agency no longer involves issues on which the agency's expertise gives it a special competence." *Id.* The Fourth Circuit concludes that "[i]n those instances where an agency has ruled on a question of law outside of its area of expertise, we no longer defer to the rulings of the agency, but instead conduct the more searching inquiry of *de novo* review." *Id.* The Fourth Circuit's unique approach cannot be squared with that of any other circuit.

The Third Circuit takes yet a fourth approach, one that is highly tentative, reflecting the uncertainty among the lower courts on this fundamental issue. The Third Circuit has held that "an agency's view of its own statutory jurisdiction *may* be entitled to deference under *Chevron*." *Air Courier Conference of Am./Int'l Comm. v. United States Postal Serv.*, 959 F.2d 1213, 1223 (3d Cir. 1992) (emphasis added). In his concurring opinion, Judge Becker emphasized his conclusion that nothing in the Supreme Court's jurisprudence requires that "an agency *always* deserves deference on a jurisdictional question if its position is reasonable and consistent." *Id.* at

1225 (Becker, J., concurring) (emphasis in original). As Judge Becker explained, "In my view, the rule is more limited: agencies *may be* entitled to deference on jurisdictional questions, especially where the statutory authorization is quite broad, implying a congressional belief that the agency possesses superior expertise in determining how to effectuate the statutory purposes." *Id.* (emphasis in original). *Compare Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 552 (3d Cir. 1988) ("This rule of deference is fully applicable to an agency's interpretation of its own jurisdiction."), *with Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981) ("[A] ruling that broadens [an agency's] own jurisdiction is examined carefully.").

Adding to the confusion is the D.C. Circuit. While not always ruling consistently,[1] the D.C. Circuit has concluded that "[w]hen an agency's assertion of power into new areas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). That court correctly observed that "a pivotal distinction exists between statutory provisions that are jurisdictional in nature—that is, provisions going to the agency's power to regulate an activity or substance—and provisions that are managerial—that is, provisions pertaining to the mechanics or

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[1] *Compare New York Shipping Ass'n v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1363 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1041 (1980) (reasoning that it would be "inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction as against that of the authorities charged with the administration of the labor laws.") *with McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 62 (D.C. Cir. 2001) ("We apply deference under *Chevron* . . . to agencies' jurisdictional decisions . . . .").

inner workings of the regulatory process." *Id.* (citations omitted). The D.C. Circuit reasoned that "it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power." *Id.*

3. The circuits have long decried the confusion on this issue. The First Circuit accurately described the law on this issue as a "morass." *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 919 F.2d 799, 803 (1st Cir. 1990). While managing to avoid deciding the issue, the First Circuit has called out for this Court's guidance, observing that "[w]e are cognizant of the ongoing debate over whether deference should be accorded to an agency interpreting the scope of its own jurisdiction." *Id.* The court further lamented that the "Supreme Court has never taken a clear institutional stand on the question." *O'Connell v. Shalala*, 79 F.3d 170, 176 n.6 (1st Cir. 1996). The Eleventh Circuit also has highlighted the confusion over *Chevron*'s role in a court's review of an agency's jurisdictional determinations. The Eleventh Circuit summed up this confusion as a "knotty issue." *Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996). And the Sixth Circuit has pointed out the conflicts and disarray among the circuits on this issue. *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 935-36 (6th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

Members of this Court, too, have expressed views on this specific issue as well as the general problems surrounding the level of deference that courts should accord an agency's purely legal determinations. *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 380-83 (1988) (Scalia, J., concurring) (discussing difficulties in distinguishing between jurisdictional and non-jurisdictional claims); *id.* at 387 (Brennan, J., dissenting) ("It is thus not surprising that this Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction.");

Dole v. United Steelworkers of Am., 494 U.S. 26, 54-55 (1990) (White, J., dissenting) (expressing agreement with Justice Scalia's concurrence in *Miss. Power & Light Co.*); *see also Mayburg v. Sec'y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.) ("[T]he larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves."); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 397 (1986) ("Would one not expect courts to conduct a stricter review of matters of law, where courts are more expert, but more lenient review of matters of policy, where agencies are more expert?"). But these members have hardly spoken with a single voice. Rather, the views are diverse, thereby adding to the confusion among the courts below.

B. The Issue Is Important and Recurring

Whether *Chevron* deference applies to an agency's interpretations of its own jurisdiction is undeniably an important and recurring question of federal law. This issue has arisen throughout the federal judiciary routinely, as demonstrated by the number of cases cited above. It will certainly continue to arise recurrently, for an agency's jurisdictional authority to act is a threshold issue in every administrative proceeding.

The conflicts will persist unless this Court provides guidance. The lower courts' confusion on this issue began to surface soon after this Court decided *Chevron* in 1984 (*see ACLU*, 823 F.2d at 1567 n.32; Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum L. Rev. 2071, 2097-2100 (1990)), and as more circuits have confronted the issue the conflicts have only deepened. Indeed, within the past few months, the Seventh and Eighth Circuits have issued squarely conflicting decisions, furthering the disunity among the circuits.

This issue also is important because a court's decision to apply *Chevron* deference to an agency's jurisdictional interpretation normally is dispositive of the litigation's outcome. As a result, a court's resolution of this issue often will dictate the reach of an agency's regulatory authority. Because the vast majority of agencies exercise regulatory authority across the nation, the disagreement from circuit to circuit regarding the agencies' regulatory scope is unacceptable to both the regulated entities and the regulators.

The circuits are not alone in calling for this Court's guidance. Commentators have recognized the critical need for this Court to resolve *Chevron*'s place in a court's review of an agency's jurisdictional interpretations. Professor Merrill recently wrote: "The most important—and vexing—question involving *Chevron*'s domain is whether there should be an exception for interpretations that implicate the scope of the agency's jurisdiction." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 909 (2001). *See also id.* at 844 n.54 ("The lower courts have divided over the question."); Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. at 2097-99 ("Does an agency have the authority to decide on its own jurisdiction? Chevron does not say . . . and there is as yet no clear answer to this question."); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. 989, 993 (1999) ("[T]he application of Chevron deference to peripheral jurisdictional questions has been and remains unsettled."); David M. Gossett, Comment, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. Chi. L. Rev. 681, 693 (1997) ("[C]ourts seem to refuse to defer to an agency's interpretation of a statute when that statute defines the limits of the agency's jurisdiction."). This Court should act now to resolve the deep divisions below.

C. The Decision Below Was Wrong

This Court also should grant review to correct the erroneous decision below. The Eighth Circuit's decision to grant complete deference to the Commission's view of its own jurisdiction ignores fundamental limitations on the *Chevron* doctrine. This Court has long recognized that an agency's determination of its jurisdiction does not automatically warrant deference. "Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'" *Adam Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). *See also Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1944) ("An agency may not finally decide the limits of its statutory power. That is a judicial function."); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). The Court is correct in its caution over *Chevron*'s role in this area, for *Chevron*'s underlying principles lose much of their force when an agency is allowed to interpret its own jurisdiction.

First, as the Court has made painstakingly clear, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adam Fruit Co.*, 494 U.S. at 649. Under *Chevron*'s principle of implied delegation, deference to an agency's policymaking or ministerial decisions is warranted only because Congress has granted the agency jurisdiction. *Id.*; *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (agency's reasonable regulatory interpretations are binding "[a]ssuming in each case, of course, that the agency's exercise of authority . . . does not exceed its jurisdiction."). But that principle cannot support the notion that a court should decide whether an agency is entitled to

deference by first granting deference to the agency's jurisdiction determinations. This Court has never "maintained that Congress would want courts to give *Chevron* deference to an agency's determination that it is entitled to *Chevron* deference, or should give *Chevron* deference to an agency's determination of what types of interpretations are entitled to *Chevron* deference. It is assumed that the court must determine whether power has been delegated to an agency before the court can be charged with deferring to the agency's exercise of that power." Merrill & Hickman, *Chevron's Domain*, 89 Geo. L.J. at 910-11. Moreover, the idea that Congress could delegate to an agency the authority to determine its own jurisdiction raises serious separation of powers concerns. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987). An agency has no legitimate constitutional authority to fill in gaps in its jurisdiction that Congress did not grant it. Nor could Congress cede to an agency the authority to decide the agency's power.

Second, Congress also has never suggested that an agency should have the authority to determine its own jurisdiction, and wisely so. "To accord such power to agencies would be to allow them to be judges in their own causes, in which they are of course susceptible to bias." Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. at 2099. *See also* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987) ("foxes should not guard henhouses"). An agency's claim of expansive regulatory jurisdiction "may be motivated by designs for agency aggrandizement rather than by a disinterested assessment of statutory authority and appropriate policy." Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1024 (1992). *See also Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting) ("statutes confining an agency's jurisdiction do not reflect conflicts between policies that have been com-

mitted to the agency's care, but rather reflect policies in favor of limiting the agency's jurisdiction that, by definition, have not been entrusted to the agency and that may indeed conflict not only with the statutory policies the agency *has* been charged with advancing but also with the agency's institutional interests in expanding its own power") (emphasis in original).

This concern is more than theoretical. The trend of agencies to expand their regulatory reach beyond their jurisdictional authority has been recently documented by Professors Gellhorn and Verkuil, who explained: "Perhaps emboldened by the role of judicial deference outlined by Chevron, agencies have increasingly ignored the boundaries of their delegated authority and made broad claims of jurisdiction into areas long thought to be outside their jurisdiction. When challenged, agencies know they can rely on the safe harbor of step two of the Chevron test by arguing that their jurisdictional conclusions are 'reasonable.'" Gellhorn & Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo L. Rev. at 996-97. *See also id.* at 997-1006 (describing examples of agencies exceeding their jurisdictional authority). Should courts continue to grant *Chevron* deference to an agency's jurisdictional determinations, as the Eighth Circuit did here, this trend toward agency aggrandizement doubtless will accelerate.

Third, *Chevron* rests on the premise that Congress intends an agency to apply its technical and policymaking expertise within an area of delegated authority. *See Chevron*, 467 U.S. at 843-44; *see also Mead Corp.*, 533 U.S. at 234. But when an agency determines its own jurisdictional authority, the agency exercises no specialized technical expertise, nor does it generally make discretionary public policy judgments. Quite the opposite, Congress's jurisdictional limits on an agency's authority amount to "a direct refutation of an

agency's expertise." Gossett, 64 U. Chi. L. Rev. at 694. Moreover, whether an agency has jurisdiction is purely an issue of law—a question that courts are to decide.

Finally, the rule that *Chevron* deference should not be granted to an agency's jurisdictional decisions in no way weakens the *Chevron* doctrine. Under *Chevron*, agencies, not courts, should make technical and public-policy judgments that Congress, through express or implied delegation, has left for agencies. But courts, not agencies, should make purely legal determinations. And threshold decisions about jurisdiction are precisely the type courts should make. If anything, this rule strengthens *Chevron*'s force.

Accordingly, the Eighth Circuit was wrong to defer entirely to the Commission's regulations that define the scope of its jurisdiction. This Court should grant review to clarify this important but confused area of law.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE STANDARDS THAT GUIDE A COURT'S DISCRETION IN GRANTING A JURY TRIAL UNDER RULE 39(b)

The circuits are in irreconcilable conflict over the basic standards that should guide the district court's discretion in reviewing a party's request for a jury trial under Rule 39(b) of the Federal Rules of Civil Procedure. Rule 39(b) expressly grants a district court discretion to permit a jury trial where, as here, a party fails to make a timely jury demand under Rule 38. Some circuits, including the Eighth, place a heavy burden squarely on the moving party to justify his or her failure to make a timely demand for a jury trial and give no consideration to whether the non-moving party would be prejudiced or inconvenienced by a jury trial. Other circuits, including the Fifth, Sixth, Tenth and Eleventh, apply an opposite standard, placing the burden on the non-moving

party to establish that there should be no jury trial. Those circuits hold that a district court should permit a jury trial under Rule 39(b) unless compelling reasons exist not to do so. Still other circuits, including the First, Second and Seventh, eschew both standards in favor of more flexible guidelines that consider all the circumstances affecting both parties. This Court should grant review to resolve this important and recurring issue, which centers on litigants' Seventh Amendment rights.

A. The Conflict Among the Circuits

1. The Eighth Circuit affirmed the district court's refusal to grant the Shelton corporate parties a jury trial. Pet. App. 22a. In doing so, the Eighth Circuit did not consider any factor other than the Shelton parties' reasons for not making a timely jury demand. Finding the Shelton parties offered no legitimate justification for their untimely request for a jury trial, the court declined to grant the relief that Rule 39(b) permits. Pet App. 21a. The Eighth Circuit did not consider that the Shelton parties' jury demand, if it was late at all, was barely so or that at the time the Shelton parties made their untimely demand, the litigation was in its embryonic stage, with the parties having conducted only minimal discovery. Nor did the Eighth Circuit consider whether a jury trial would cause any prejudice to the government. The Eighth Circuit scrutinized the Shelton parties' conduct alone and placed the burden entirely on them to persuade the district court that they should be afforded the right to a jury trial. *Id.*

The Ninth Circuit, when considering relief under Rule 39(b), also examines only a moving party's reason for making an untimely jury-trial demand. "An untimely request for a jury trial *must* be denied *unless* some cause beyond mere inadvertence is shown." *Pac. Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd.*, 239 F.3d 1000, 1002 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 324 (2001) (emphasis added). The Ninth

Circuit accordingly has found that a district court has little discretion to grant relief from waiver. "[A]n untimely jury demand due to legal mistake does not broaden the district court's narrow discretion to grant the demand." *Id.* at 1003.

The Fourth Circuit also has indicated a district court may grant relief under Rule 39(b) under only limited circumstances. In *Gen. Tire & Rubber Co. v. Watkins*, 331 F.2d 192 (4th Cir. 1964), *cert. denied*, 377 U.S. 952 (1969), the court noted: "We recognize the principle, as often enunciated by the courts, that there may be exceptional circumstances present which would appear to compel the court, in the exercise of its discretion, to order a jury trial." *Id.* at 197. Later, Judge Widener explained his belief that the Fourth Circuit would follow this statement as precedent, but he noted his disagreement with that result. "I believe such an approach is contrary to the spirit of the Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution. I am of opinion that district courts should construe Rule 39(b) to allow jury trials upon any party's motion absent compelling reasons to decline the motion, and I believe the time has come for this circuit to adopt such an approach." *Wertz v. Grubbs*, No. 93-2355, 1995 WL 3164, at *6 (4th Cir. Jan. 5, 1995).

2. The Fifth, Sixth, Tenth and Eleventh Circuits take a completely different approach. These circuits have held that a district court should grant relief under Rule 39(b) unless compelling reasons exist not to do so. In *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983), *cert. denied*, 464 U.S. 936 (1983), the Eleventh Circuit held that an untimely jury request should be granted unless strong reasons weigh against it. Under the Eleventh Circuit's approach, a district court must consider the moving party's reason for the delay as well as the length of the delay and the amount of prejudice to the non-moving party.

The Fifth Circuit, while finding that "mere inadvertence" does not justify relief under Rule 39(b), holds that "the seventh amendment confers a fundamental right. This modifies the usual approach to review of abuse of discretion. '[W]hen the discretion of the court is invoked under Rule 39(b), the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.' A motion for trial by jury under this rule 'should be favorably received unless there are persuasive reasons to deny it.'" *Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir. 1990) (citations omitted).

The Sixth Circuit similarly has held "the court's discretion should be exercised in favor of granting a jury trial where there are no compelling reasons to the contrary." *Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 207 (6th Cir. 1990). And the Tenth Circuit has recognized that relief may be denied when "mere inadvertence" is to blame, but that "absent strong and compelling reasons to the contrary, a district court should exercise its discretion under Rule 39(b) and grant a jury trial." *Nissan Motor Corp. v. Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992).

3. In contrast to these circuit courts, which impose clear limits on a district court's discretion (albeit in conflicting directions), the First, Second and Seventh Circuits have applied a more flexible standard. The First Circuit has recognized the divergent views among the circuits and has crafted its own standard: "We are of the view that the discretion under Rule 39(b) is very broad and that the case would be very rare indeed where a district court abused its discretion in denying *or* granting a Rule 39(b) motion." *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 200 (1st Cir. 1987) (emphasis in original), *overruled on other grounds by Iacobucci v. Boulter*, 193 F.3d 14, 27 (1st Cir. 1999). The Second Circuit has held the party submitting a late jury demand must make a showing beyond inadvertence, but that,

at least in a case removed to federal court, the court should consider the request "'with an open mind and an eye to the factual situation in that particular case, rather than with a fixed policy against granting the application or even a preconceived notion that applications of this kind are usually to be denied.'" *Cascone v. Ortho Pharm. Corp.*, 702 F.2d 389, 392 (2d Cir. 1983) (quoting 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2334, at 116 (1971)). And the Seventh Circuit has applied a similar standard, directing district courts to consider the reason for the request as well as all relevant circumstances. *See Members v. Paige*, 140 F.3d 699, 704 (7th Cir. 1998).

Predictably, legal scholars have observed that the circuits are divided over what standard courts should apply in reviewing a party's request for a jury trial under Rule 39(b). "Some courts express one standard for the exercise of discretion on these motions, other courts express a contrary standard for the exercise of discretion." 8 James Wm. Moore et al., *Moore's Federal Practice* § 39.31[3], at 39-49 (3d ed. 2002); *see also* § 39.31[4], at 39-50 (discussing the "Conflicting Standards for Exercising Discretion on Motion for Jury"). This Court should resolve this important issue, which is causing confusion among the circuit courts.

B. The Issue Is Important and Recurring

The recurring and multiple conflicts over the proper limits on a district court's discretion to deny a request for a jury trial under Rule 39(b) are reason alone for this Court to grant review. It also bears emphasis that the rights at stake under Rule 39(b) are profoundly important. Rule 39(b) serves to preserve a party's Seventh Amendment right to a jury, which this Court has diligently protected. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized

with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). "[T]his Court has carefully preserved the right to trial by jury where legal rights are at stake." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). It is unacceptable for circuit courts to apply such an array of standards when faced with a right of such long-recognized significance. The Court should resolve this conflict.

C. The Decision Below Was Wrong

This Court also should grant review because the Eighth Circuit was wrong to affirm the district court's refusal to allow the Shelton corporate parties a jury trial. The government could not have been meaningfully harmed by a jury trial for the Shelton corporate parties. In fact, the government did not even argue before the Eighth Circuit that it would have suffered prejudice had the district court granted the Shelton corporate parties' Rule 39(b) motion.

The record amply demonstrates why the government would have suffered no prejudice from a jury trial. The Shelton corporate parties requested a jury trial in the early stages of this litigation. The government filed suit against the Shelton corporate parties in November 1996. Later, on May 20, 1997, the government amended its complaint to add to this litigation Gregory Shelton in his individual capacity. At that point, Shelton and the Shelton corporate parties answered the government's amended complaint and requested a jury trial for both Shelton and the Shelton corporate parties. The government's decision to add Shelton individually to the litigation altered the landscape of this litigation and, consequently, the strategic considerations for the Shelton parties, including the basic decision of whether the factual issues should be decided by the bench or a jury.

On June 11, 1997, when the Shelton corporate parties requested a jury trial, little written discovery by either side

had occurred. The government had deposed only one witness. And petitioners had not deposed any witnesses. Following the Shelton corporate parties' jury demand, the parties deposed twenty seven witnesses and completed the majority of written discovery.

Moreover, the government waited until nearly the eve of trial before asking the court to deny the Shelton corporate parties a jury trial. The government delayed asking the court to strike the jury demand until over ten months after the Shelton corporate parties had requested a jury trial and just three weeks before trial. In its briefing in the Eighth Circuit, the government admitted that whether a jury would hear the case remained "unsettled" until the district court issued its order shortly before trial.[2] The government, therefore, was hardly unprepared for a jury trial.

Furthermore, the Eighth Circuit deviated from its own precedent in denying the Shelton corporate parties a jury trial. The court relied on *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581 (8th Cir. 1980), *cert. denied*, 445 U.S. 945 (1980). *See* Pet. App. 21a. But the *Littlefield* court actually recognized that courts should approach each Rule 39(b) request "with an open mind," and that "jury trials ought to be liberally granted when no prejudice results." *Littlefield*, 614 F.2d at 585. The court denied the Rule 39(b) motion only after finding the movant's only reason for the late request was inexperience *and* that "the record shows that Littlefield engaged in a pattern of conduct apparently intended to delay trial. . . . In *these* circumstances, denial of the request was

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[2] Before the district court ruled on the issue, several Amended Scheduling Orders indicated a jury would hear the case. A docket entry on August 12, 1997, for example, shows "jury trial set 2/17/98." Another on March 12, 1998, shows "jury trial set 5/11/98." And the docket entry for April 14, 1998, shows "voir dire due 5/4/98 for Gregory P. Shelton, for Polaris Fireworks, In [sic], for Shelton Wholesale, for USA; proposed jury instructions due 5/4/98 for Gregory P. Shelton, for Polaris Fireworks, In [sic], for Shelton Wholesale, for USA."

within the bounds of the discretion of the trial court." *Id.* (emphasis added). Neither the Eighth Circuit nor the district court alleged the corporate parties engaged in delay tactics. *Littlefield* does not support the Eighth Circuit's denial of Rule 39(b) relief in this case.

As other circuits have recognized, the Seventh Amendment embodies a fundamental right. This Court should grant the writ and require that a district court exercise its discretion in favor of granting relief from waiver if, as here, there is no conflicting compelling reason.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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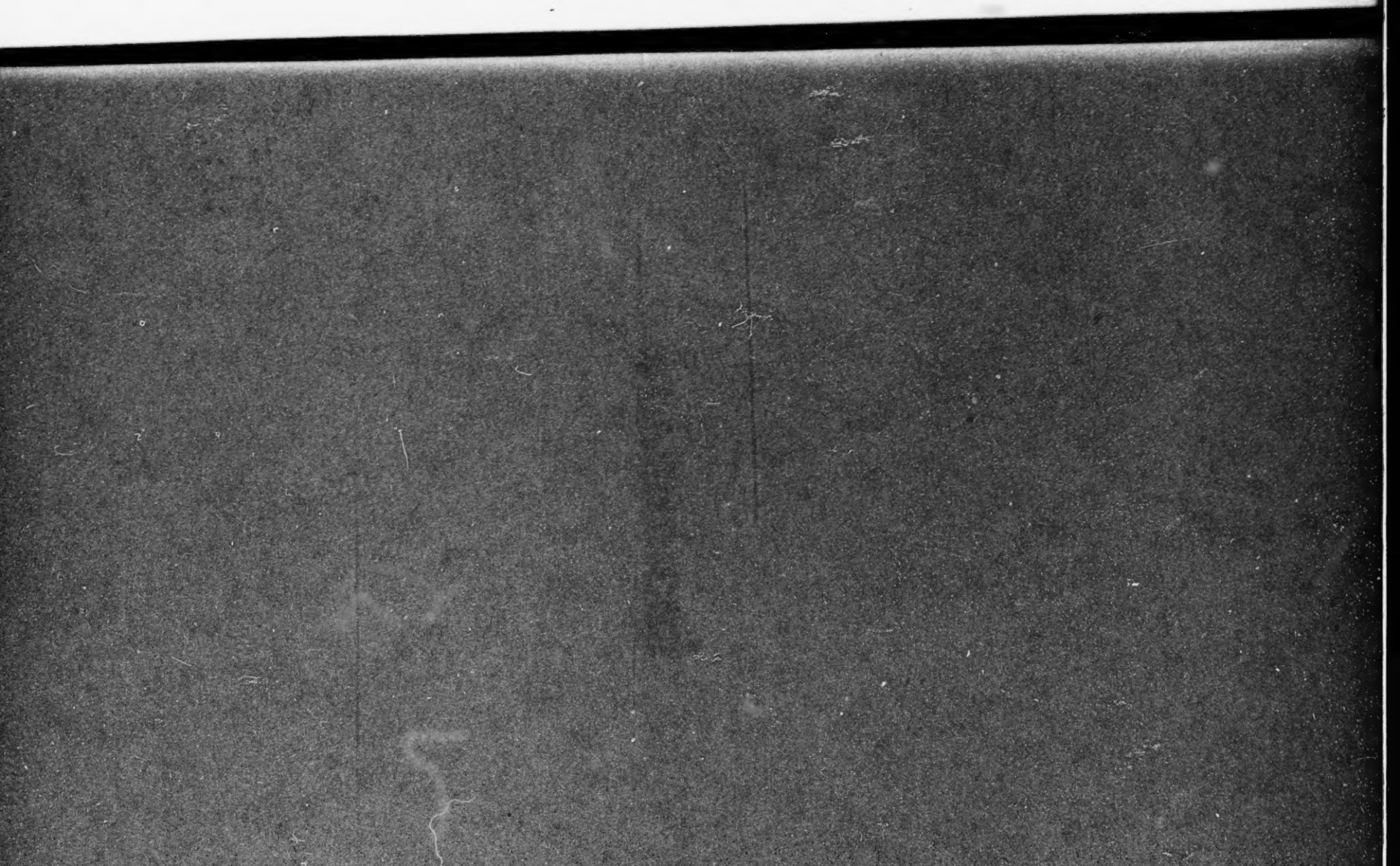
June 27, 2002

APPENDICES



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1450

GREG SHELTON, SHELTON WHOLESALE, INC., NATIONAL FIREWORKS ASSOCIATION, INC.,
Plaintiffs-Appellants,

v.

CONSUMER PRODUCTS SAFETY COMMISSION; UNITED STATES; ANN BROWN, CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION; ERIC B. AULT, DIRECTOR, CENTRAL REGIONAL CENTER, U.S. CONSUMER PRODUCT SAFETY DIVISION,
Defendants-Appellees.

No. 01-1599

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

SHELTON WHOLESALE, INC., a Missouri corporation, doing business as SHELTON FIREWORKS, INC., doing business as POLARIS FIREWORKS; POLARIS FIREWORKS, INC., a Missouri corporation; GREGORY P. SHELTON,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF MISSOURI

Submitted: September 10, 2001
Filed: January 23, 2002

Before McMILLIAN, BEAM and HANSEN, *Circuit Judges*.

McMILLIAN, *Circuit Judge*.

Shelton Wholesale, Inc., and Polaris Fireworks, Inc., (together, the "corporate parties") are Missouri businesses that import and distribute fireworks from Hong Kong, and Gregory Shelton is president and owner of both corporate parties. Gregory Shelton and the corporate parties (collectively, "the Shelton parties") appeal from two final orders granting summary judgment, a final bench verdict, and a bench ruling in favor of the United States and the Consumer Product Safety Commission ("CPSC") (together, the "Government"), entered in the United States District Court for the Western District of Missouri[1] in two related cases. *United States v. Shelton Wholesale, Inc.*, No. 96-6131-CV-SJ-6 (W.D. Mo. filed Oct. 2, 1996) ("the Fine Case"); *Shelton v. Consumer Products Safety Comm'n.*, No. 97-6021-CV-SJ-6) (W.D. Mo. filed Feb. 14, 1997) ("the NFA Case"). For reversal in both cases, the Shelton parties argue that the district court (1) erred in holding that the CPSC did not exceed its jurisdiction because the Federal Hazardous Substances Act ("FHSA") does not extend to common fireworks, (2) erred in holding that the CPSC did not violate the Shelton parties' due process rights by destroying the Shelton parties' fireworks without providing an opportunity for a full administrative hearing, (3) abused its discretion in admitting into evidence laboratory test reports offered by the Government under the business exception to the hearsay rule,

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[1] The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

and (4) abused its discretion in denying a jury trial to the corporate parties. For the reasons discussed below, we affirm the orders of the district court.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

I. Factual and Procedural Background

In the Fine Case, the United States sought civil penalties and injunctive relief against the Shelton parties for violations of the FHSA, 15 U.S.C. § 1261 *et seq.* Between 1992 and 1996, the Shelton parties imported fireworks from Hong Kong that the Government contended were defective under fireworks regulations enacted pursuant to the FHSA and enforced by the CPSC. The United States originally filed suit in the Fine Case against the corporate parties—but not Gregory Shelton—on October 2, 1996, and filed an amended complaint on November 7, 1996.[2] On February 20, 1997, the United States moved to amend its complaint to add Gregory Shelton. On May 20, 1997, the district court granted the United States' motion; on the same day, the United States filed its second amended complaint adding Gregory Shelton. On June 11, 1997, all three defendants comprising the Shelton parties answered the second amended complaint and, for the first time, demanded a jury trial.

On February 14, 1997, the Shelton parties and a nonprofit trade association, National Fireworks Association, Ltd. ("NFA"), filed suit in the NFA Case against the CPSC seeking a declaratory judgment that the CPSC (1) had no

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[2] The United States amended its complaint to reduce the list of Shelton's products it contended were defective from twenty-two products to nineteen products, and to add more specific information about which of the regulations the other products violated.

jurisdiction over common fireworks, (2) had denied the Shelton parties' due process rights, and (3) had improperly tested the fireworks.

On April 28, 1998, after noting that the parties incorporated into their briefs in the Fine Case many of the same arguments raised in the NFA Case, the district court ruled on summary judgment in both cases that the FHSA extends to common fireworks and that the Shelton parties' due process rights had not been violated. *See United States v. Shelton Wholesale, Inc.*, No. 96-6131-CV-SJ-6/97-6021-CV-SJ-4-6, 1998 WL 251273, at 1, 3 n.7 (W.D. Mo. Apr. 28, 1998) (*Shelton I*) (granting partial summary judgment in Fine Case and NFA Case, reserving questions of fact for trial). The district court noted that the uncontroverted evidence showed that the CPSC had selected nineteen samples representing various fireworks products for testing from twelve shipments imported by the Shelton parties from Hong Kong to a United States Customs Port. *See id.* at 1. All of the fireworks products were common fireworks (e.g. toy paper caps, cone fountains, cylinder fountains, whistles without report, and sparklers), and were intended only to be used outdoors. *See id.* at 4. The CPSC transported the samples to its laboratory to conduct performance tests to determine whether the fireworks products were safe for consumers based on the standards outlined in the fireworks regulations. *See id.* at 2. When the samples of all of the nineteen fireworks products failed at least one (and in some cases more than one) of the performance tests conducted, the CPSC determined that each of the fireworks products was a banned hazardous substance under the FHSA. *See id.* at 3, 4.

On May 1, 1998, the district court ruled that the corporate parties were not entitled to a jury trial because the corporate parties did not make a timely demand for a jury trial, but that a separate jury trial for Gregory Shelton, who had timely invoked his right to a jury, was appropriate. *See United*

States v. Shelton Wholesale, Inc., No. 96-6131-CV-SJ-6/97 -6021-CV-SJ-4-6 (May 1, 1998) (order denying jury trial to corporate parties).

At the bench trial, the Government called CPSC Director of Laboratory Sciences Warren Porter to introduce the laboratory test results for each of the nineteen products. Porter testified on direct examination that the CPSC always uses the following procedures when it tests fireworks: First, each fireworks performance test is conducted by a chemist and a technician, who contemporaneously record the test results on a standard form. Next, the secretary enters the test results recorded on the form into a database and prints out a report. The report is checked for accuracy by the same chemist and technician who performed the test, then the report is brought to Porter, who conducts a final review for accuracy. The district court admitted the test reports into evidence under the business records exception over the Shelton parties' objection that the laboratory reports were not produced in the regular course of business because Porter did not personally conduct all of the testing and less experienced analysts helped with the testing on occasion. The Shelton parties' expert witness, Dr. Roger L. Schneider, testified that the CPSC test methods were imprecise in his opinion because human error was not considered to the extent he deemed sufficient. *See Shelton I*, 1998 WL 251273, at 10.

The evidence further showed that each time the CPSC determined that one of the Shelton parties' fireworks products violated the fireworks regulations, the CPSC informed the Shelton parties by sending a letter of advice ("LOA"), itemizing the violations and explaining the procedures for submitting contrary evidence or views. *See id.* at 3-4. With respect to the first seven products, the CPSC sent LOAs to Polaris Fireworks, Inc., addressed to Gregory Shelton, that stated "[i]f you disagree with our decision regarding these . . . banned fireworks devices, you may submit your

views as to why you disagree with our conclusion. You should submit any information that you wish to offer into evidence within 10 days of your receipt of this letter."

For products eight through nineteen, the LOAs were accompanied by a copy of the CPSC's Regulated Products Handbook and referred to the relevant chapter therein describing what importers and distributors should do if they disagreed with the CPSC's conclusions. Chapter Two of the Regulated Products Handbook explains:

> In response to the LOA, you may submit to the [CPSC] staff evidence and arguments that the product is not violative, not covered by a specific regulation, or should not be refused admission into the US. . . . Such evidence may consist of:
>
> - results of tests indicating the product complies with the applicable regulation;
> - marketing data indicating the product is not intended for the population group protected by the regulation;
> - any other type of information.

Each LOA specified the individual to whom any responses should be directed, and included that individual's address and telephone number. In total, the Shelton parties submitted one letter challenging the CPSC's finding with respect to two of the nineteen products for which they received LOAs. *See Shelton I*, 1998 WL 251273, at 9.

On January 6, 1999, at the conclusion of the bench trial, the district court issued a joint memorandum and order, ruling in both cases that the fireworks products in question were banned hazardous substances under the FHSA and that the Shelton parties' due process rights had not been violated. *See United States v. Shelton*, 34 F.Supp. 2d 1147, 1167 (W.D. Mo. 1999) (entering judgment in favor of Government and

against corporate parties; rejecting corporate parties' renewed due process claims and attacks on precision of CPSC testing methods) (*Shelton II*).

In the Fine Case, the district court assessed a $100,000 fine against Shelton Wholesale, Inc., for knowingly importing as many as ten of the nineteen products at issue in violation of the FHSA. *See id.* at 1166-67. The district court reasoned that Shelton Wholesale, Inc., had failed to exercise due care when it imported those fireworks, because Gregory Shelton was on notice that the fireworks he imported through Polaris Fireworks, Inc., were hazardous after receiving the first group of LOAs. *See id.* at 1163. The district court also enjoined the corporate parties from knowingly or recklessly importing products in the future that violate the FHSA. *See id.* at 1166-7.

On September 21, 1999, the district court held that there were no material facts in dispute and granted summary judgment in favor of the Government against Gregory Shelton based on its earlier ruling that the Shelton parties had violated the FHSA. *See United States v. Shelton Wholesale, Inc.*, No. 96-6131-CV-SJ-6, 1999 WL 825483, at 1 (W.D. Mo. Sept. 21, 1999) (*Shelton III*) (granting summary judgment against Gregory Shelton because no genuine issue remained as to whether Shelton parties violated FHSA; noting no additional legal or factual defenses, and no challenges to previous summary judgment motions or evidence presented at corporate parties' trial). The district court also enjoined Gregory Shelton from knowingly or recklessly importing products in violation of the FHSA. *See id.* The Shelton parties timely filed notices of appeal in the Fine Case and the NFA Case pursuant to Fed. R. App. P. 4(a). This Court consolidated the Fine Case and the NFA Case for purposes of appeal on April 2, 2001.

II. Interpretation of the FHSA

The Shelton parties argue that the district court erred in holding that the FHSA confers to the CPSC jurisdiction over adequately labeled common fireworks. The Shelton parties and the NFA argue that common fireworks are exempted from the reach of the CPSC.

Because this question requires the legal interpretation of a statute, we review this issue de novo. *See Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 936 (8th Cir. 2000) (*Ragsdale*); *Boles Trucking, Inc. v. United States*, 77 F.3d 236, 242 n.3 (8th Cir. 1996). When interpreting a statute, this Court first analyzes whether congressional intent is clear from the plain meaning of the statute. *See Chevron U.S.A. v. Natural Res. Def. Couns.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (*Chevron*); *Ragsdale*, 218 F.3d at 936. If the intent is clear, that is the end of the inquiry. *See Chevron*, 467 U.S. at 842-43. If congressional intent is not clear, this Court defers to the agency construction of the statute, provided that the construction is rea sonable. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S.Ct. 1291, 146 L.Ed. 121 (2000) (holding that federal agency charged with administering statute is accorded deference in interpreting statute "because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated"); *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778; *Ragsdale*, 218 F.3d at 936. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11, 104 S.Ct. 2778; *see also Wittler v. Chater*, 59 F.3d 95, 97 (8th Cir. 1995) (affirming agency's interpretation of statute

because it reflected "a plausible construction of the plain language of the statute").[3] We hold that the district court correctly determined that the FHSA applies to common fireworks based on the plain meaning of the statute.

The FHSA provides in pertinent part that:

> [t]he term "banned hazardous substance" means (A) any toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted; or (B) any hazardous substance intended, or packaged in a form suitable, for use in the household, which the [CPSC] by regulation classifies as a "banned hazardous substance" on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this Act for that substance, the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be

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[3] Gregory Shelton argues that the CPSC construction is not entitled to deference because the FHSA is also a criminal statute and, therefore, is subject to the rule of lenity. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992) (plurality). However, the rule of lenity is applied only where there still exists an ambiguity after the reviewing court applies traditional methods of statutory construction. *See id.* at 517-18, 112 S.Ct. 2102; *United States v. Galloway*, 976 F.2d 414, 421 n.5 (8th Cir. 1992) (declining to invoke rule of lenity because no ambiguity in statute); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."). Here, the rule of lenity has no application because there is no ambiguity with respect to the relevant provisions in the FHSA.

> adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce: *Provided, That the [CPSC], by regulation . . .(ii) shall exempt from clause (A), and provide for the labeling of, common fireworks . . . to the extent that [it] determines that such articles can be adequately labeled to protect the purchasers and users thereof.*

15 U.S.C. § 1261(q)(1) (emphasis added). The Shelton parties argue erroneously that Clause B does not apply because Clause A, which bans toys containing hazardous substances, completely exempts adequately labeled common fireworks from classification as banned hazardous substances. However, it is clear from the plain language of the statute that Congress intended Clause A and Clause B to serve two different purposes. Clause A, on its face and through subsection (ii) of the proviso, expressly bans hazardous products that are intended solely for use by children unless those products can be adequately labeled. Therefore, any hazardous products that are not intended solely for use by children, and products that are adequately labeled, are not governed by Clause A. That does not mean that such hazardous products are immune from the jurisdiction of the CPSC—only that they cannot be banned pursuant to that particular clause. Clause B serves the more general purpose of banning hazardous substances regardless of whether they are intended for children or adults, and "notwithstanding . . . cautionary labeling. "15 U.S.C. § 1261(q)(1)(B). The clauses do not conflict with one another, as the Shelton parties seem to suggest; rather, the clauses complement one another.

Clause B does not provide a list of banned products. Instead, the clause requires the CPSC to develop rules governing the banning of hazardous substances, which the CPSC did in developing the fireworks regulations. *Accord*

Chevron, 467 U.S. at 843-44, 104 S.Ct. 2778 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."). The fireworks regulations were promulgated to fill the gap in Clause B—not Clause A—in order to determine which products cannot be made safe even with cautionary labeling. As the fireworks regulations explain,

> [u]nder the authority of section 2(q)(1)(B) of the [FHSA], the [CPSC] declares as banned hazardous substances the following articles because they possess such a degree or nature of hazard that adequate cautionary labeling cannot be written and the public health and safety can be served only by keeping such articles out of interstate commerce: . . . (9) All fireworks devices, other than firecrackers, including kits and components intended to produce such fireworks, not otherwise banned under the act, that do not comply with the applicable requirements of part 1507 of this chapter . . .

16 C.F.R. § 1500.17(a). The CPSC has specifically determined that products that fail the performance standards outlined in its regulations must be banned. *See* 16 C.F.R. § 1507.1 ("This part 1507 prescribes requirements for those fireworks devices . . . not otherwise banned under the [FHSA]. Any fireworks device . . . which fails to conform to applicable requirements is a banned hazardous substance and is prohibited from the channels of interstate commerce. Any fireworks device not otherwise banned under the [FHSA] shall not be a banned hazardous substance by virtue of the fact that there are no applicable requirements prescribed herein."). Thus, neither the FHSA nor the fireworks regulations completely ban common fireworks;

they ban only common fireworks that violate certain performance standards, as the Shelton parties' fireworks did in this case.

When all of the Shelton parties' nineteen tested products failed the minimum performance standards set forth by the regulations, the CPSC determined that the fireworks in question could not be made safe for use in the household by the general public regardless of whether the products had cautionary labeling. These are the types of circumstances for which Clause B—not Clause A—was intended. The plain reading of the statute leaves no other plausible interpretation.[4]

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[4] The Shelton parties also suggest that Clause B could not possibly pertain to common fireworks because (1) common fireworks are toys, which are subject only to Clause A and exempted by that clause, and (2) their fireworks are intended for outdoor use, and therefore not intended to be used "in households." Both arguments fail. With respect to the first argument, we adopt the reasoning of the Third Circuit:

> This court previously has noted the likely combination of children and fireworks. *See Suchomajcz v. Hummel Chem. Co.*, 524 F.2d 19, 26 (3d Cir. 1975). Furthermore, the statute itself treats fireworks as toys. *See* 15 U.S.C. § 1261(q)(1) (1982) (exempting from the § 1261(q)(1)(A) ban any common fireworks to the extent the Secretary deems adequate labels can be devised). It should be noted, however, that the Secretary promulgated the bans on fireworks pursuant to 15 U.S.C. § 1261(q)(1)(B), not pursuant to (q)(1)(A). *See* 16 C.F.R. § 1500.17(a) (1988). Therefore, they ban fireworks that have been deemed a threat to society at large. *Id.* Any focus upon children is misplaced.

United States v. Focht, 882 F.2d 55, 61 n.15 (3d Cir. 1989) (emphasis added). Similarly, the CPSC determined in the present case that the Shelton parties' products were dangerous enough to constitute a threat to the general population, not just to children, and accordingly proceeded under Clause B.

The Shelton parties' next argument, suggesting that Clause B's reference to households means that it applies only to products used indoors and not outdoors, is also without merit because the FHSA makes

Hence, we conclude that the district court did not err in holding that the Shelton parties' fireworks were subject to Clause B of the FHSA and to the jurisdiction of the CPSC.

III. Due Process Claim

The Shelton parties next argue that the district court erred in ruling that their due process rights were not violated. The Shelton parties and the NFA accordingly request that this Court reverse the district court's ruling in the Fine Case that the Shelton parties violated the FHSA. We review the Shelton parties' claim that they were denied due process de novo because it is a constitutional claim, requiring legal interpretation. *See McNary v. Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 1115 S.Ct. 888, 112 L.Ed. 1005 (1991).

The Shelton parties argue that the CPSC should have provided a full administrative hearing before destroying the fireworks it determined were banned hazardous substances. As an initial matter, the Supreme Court has held that due process does not always require a full administrative hearing. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (holding that due process requirements vary, that generally something less than full

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no such distinction. Indeed, 16 C.F.R. § 1500.3(c)(10)(i), qualifying the language in the FHSA, precisely refutes this contention. Specifically, § 1500.3(c)(10)(i) provides: [h]azardous substances intended, or packaged in a form suitable, for use in the household means any hazardous substance, whether or not packaged, that under any customary or reasonably foreseeable condition of purchase, storage, or use may be brought into or around a house, apartment, or other place where people dwell, or in or around any related building or shed including, but not limited to, a garage, carport, barn, or storage shed. . . . Size of unit or container is not the only index of whether the article is suitable for use in or around the household; the test shall be whether under any reasonably foreseeable condition of purchase, storage, or use the article may be found in or around a dwelling.

evidentiary hearing is sufficient, and that essential requirements of due process are notice and opportunity for response); *United States v. Florida East Coast Ry. Corp.*, 410 U.S. 224, 241, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973) (holding that "hearing" under the Administrative Procedure Act requires that parties have fair notice of what agency intends to do and that parties have opportunity to comment; but "hearing" does not require oral testimony, cross-examination, or oral argument). The Shelton parties concede that the FHSA itself does not specify that the hearing must be a full administrative hearing.[5]

The Shelton parties argue that they were entitled to a full administrative hearing because the Consumer Product Safety Act, 15 U.S.C. § 2066, ("CPSA"), a statute that is also administered by the CPSC, requires a full administrative hearing before an administrative law judge before a product is refused admission into the United States. However, the CPSA is a separate statute that has no application in this case.

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[5] The relevant portion of the FHSA, 15 U.S.C. § 1273(a), provides:

> Delivery of samples to [CPSC]; examination; refusal of admission. The Secretary of the Treasury shall deliver to the [CPSC], upon [its] request, samples of hazardous substances which are being imported or offered for import into the United States, giving notice thereof to the owner or consignee, who may appear before the [CPSC] and have the right to introduce testimony. If it appears from the examination of such samples or otherwise that such hazardous substance is a misbranded hazardous substance or banned hazardous substance or in violation of section 4(f) [15 U.S.C. § 1263(f)], then such hazardous substance shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such hazardous substance refused admission unless such hazardous substance is exported, under regulations prescribed by the Secretary of the Treasury, within ninety days of the date of notice of such refusal or within such additional time as may be permitted pursuant to such regulations.

The United States brought this action against the Shelton parties pursuant to the FHSA and the fireworks regulations promulgated pursuant to the FHSA.[6] Thus, the Shelton parties' arguments with respect to the CPSA are irrelevant.[7]

Citing 16 C.F.R. § 1500.268, the Shelton parties argue that the regulations promulgated pursuant to the FHSA also require a full administrative hearing. In so arguing, the Shelton parties misconstrue the plain language of 16 C.F.R. § 1500.268 (titled "hearing," and defining "hearing" in context of FHSA).

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[6] Pursuant to 15 U.S.C. § 2079(d), the CPSC can only regulate a product that is subject to the FHSA under the CPSA if it makes a specific finding that it is in the public interest to do so, which the CPSC did not do in this case. 15 U.S.C. § 2079(d) provides:

> [r]egulation by Commission of consumer products in accordance with other provisions of law. A risk of injury which is associated with a consumer product and which could be eliminated or reduced to a sufficient extent by action under the Federal Hazardous Substances Act . . . may be regulated under this Act only if the Commission by rule finds that it is in the public interest to regulate such risk of injury under this Act. . . .

[7] The Shelton parties argue further that the CPSC specifically applied the CPSA to the importation of fireworks in this case, referring to the following language in some of the LOAs: "Sections 15 and 37 of the CPSA contain requirements for reporting to the Commission information on certain products which you manufacture, import, or distribute." However, while importers and distributors are obligated under the CPSA to report potentially hazardous products, that requirement is separate from the provisions in the FHSA, under which the Government proceeded in this action. *See* Ex. 12 (Regulated Products Handbook, Ch. 5, at 10-11) ("This chapter contains information to familiarize companies with their reporting obligations under the Consumer Product Safety Act (CPSA). Companies that distribute consumer products subject to the Federal Hazardous Substances Safety Act (FHSA) . . . also must comply with these reporting requirements.").

Subsection (a) of 16 C.F.R. § 1500.268 requires, first, that "[i]f it appears that the hazardous substance may be subject to refusal of admission, the area office director shall give the owner or consignee a written notice to that effect, stating the reasons therefor." It is undisputed that the products appeared to the CPSC to be subject to refusal of admission because all of the products failed the tests the CPSC conducted. It is further undisputed that written LOAs to that effect were sent to the Shelton parties, and that the LOAs identified the specific performance standards that the products failed.

The regulation next requires that "[t]he notice shall specify a place and a period of time during which the owner or consignee shall have an opportunity to introduce testimony." *Id.* In this case, the LOAs explained that the Shelton parties should introduce any evidence to the CPSC staff, provided the address, and stipulated that the time period was within ten days from receipt of the LOA.

The regulation continues: "[u]pon timely request, giving reasonable grounds therefor, such time and place may be changed." *Id.* The Shelton parties argue that, because the fireworks were being held by the United States Customs Department ("U.S. Customs"), the Shelton parties could not conduct their own testing, and that it is insufficient for the Government to argue that the Shelton parties could have requested an extension of time to respond to the LOAs or obtained approval from U.S. Customs to sample the products. However, 16 C.F.R. § 1500.268(a) speaks explicitly to the contrary. *See also Shelton II*, 34 F. Supp. 2d at 1152 (pointing to uncontroverted testimony that CPSC granted only request to take samples from shipment held under customs bond, and, that 19 C.F.R. § 19.8 permits examination and sampling of goods held in bonded warehouse). At no point did the Shelton parties attempt to take advantage of the provision that allowed them to request that either the time or place be changed.

Finally, the regulation provides that "[s]uch testimony shall be confined to matters relevant to the admissibility of the hazardous substance, and may be introduced orally or in writing." 16 C.F.R. § 1500.268(a). The Shelton parties actually did respond to one of the LOAs by submitting written evidence to rebut the conclusion of the CPSC—albeit with respect to only one product out of the nineteen products for which LOAs were received—evincing that Gregory Shelton had notice of his opportunity to submit evidence. Accordingly, the district court properly held that the CPSC had not violated the Shelton parties' due process rights.

IV. Admissibility into Evidence of Laboratory Reports

The Shelton parties argue that the district court erred in admitting the CPSC laboratory test reports into evidence under the business records exception, and that the laboratory reports were the only evidence offered to prove that the nineteen fireworks were banned hazardous substances.[8]

We review a trial court's evidentiary rulings under the abuse of discretion standard, *see General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), affording the district court substantial deference. *See Sphere Drake Ins. PLC v. Trisko*, 226 F.3d 951, 954 (8th Cir. 2000). For the reasons discussed below, we hold that the district court did not abuse its discretion in admitting the laboratory reports into evidence as business records.

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[8] The Shelton parties also argue that the reports were improperly admitted expert testimony because the CPSC did not establish that the testers had the skill, experience, training, or specialized knowledge required by Fed. R. Evid. 702. We do not reach this argument because we hold that the district court did not abuse its discretion by admitting the laboratory reports into evidence under Fed. R. Evid. 803(6).

Fed. R. Evid. 803(6) permits admission into evidence of "records of regularly conducted activity."[9] The Shelton parties argue that the Government failed to meet its burden of proving that the CPSC employees who conducted the testing did so in the regular course of business. We disagree.

As an initial matter, laboratory test reports constitute business records and therefore are admissible subject to the requirements of Fed. R. Evid. 803(6). See United States v. Baker, 855 F.2d 1353, 1359-60 (8th Cir. 1988) (affirming district court holding that regularly conducted laboratory reports were admissible as business records under Fed. R. Evid. 803(6)). It is undisputed that the CPSC tests fireworks in the course of its regularly conducted activity. *See* Tr. of proceeding, May 11, 1998 (Trial Test. of Warren K. Porter, Jr.); *see also United States v. Midwest Fireworks Mfg. Co.*, 248 F.3d 563 (6th Cir. 2001) (finding that CPSC conducts at least 4,000-5,000 tests on fireworks per year). It is further undisputed that every time the CPSC tests fireworks, the data is recorded in the same way,

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[9] The business records exception provides that the hearsay rule does not exclude from evidence:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Fed. R. Evid. 803(6).

reviewed for accuracy in the same way, and stored in the same way. See Tr. of proceeding, May 11, 1998 (Trial Test. of Warren K. Porter, Jr.). Therefore, the Government met its initial burden of showing that the laboratory test reports in question fell within the business records exception.

The business records exception applies, and the records are deemed admissible, unless problems of untrustworthiness appear. *See* Fed. R. Evid. 803(6) (providing that records made in course of regularly conducted business will be taken as admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness"); *c.f. Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983) (*Kehm*) (interpreting test for admissibility of public records pursuant to Fed. R. Evid. 803(8)). The language of Fed. R. Evid. 803(6) parallels the principles we articulated in *Kehm*, where we held that the public records exception assumes admissibility in the first instance and provides that the party opposing admission has the burden of proving inadmissibility. We therefore apply the same principles to admission of business records that we articulated for admission of public records in *Kehm*, and hold that once the offering party has met its burden of establishing the foundational requirements of the business records exception, the burden shifts to the party opposing admission to prove inadmissibility by establishing sufficient indicia of untrustworthiness. *See id.* at 618; *see also* 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 450 (2d ed. 1994) (arguing that party objecting to admission of business record bears burden of raising trustworthiness issue and showing that record is untrustworthy).

The Shelton parties failed to challenge the trustworthiness of the information contained in the laboratory reports, or to suggest that the information was recorded inaccurately or that

the CPSC does not test fireworks regularly. Although the Shelton parties argue that some of the laboratory technicians who tested the Shelton parties' fireworks had less experience than others, this contention is irrelevant to the question of whether the records were kept in the regular course of business at the CPSC. The testimony of the Shelton parties' expert, Dr. Schnieder, opining that the tests themselves did not actually prove that the fireworks were hazardous, goes to the weight of the reports, not their admissibility. *See Firemen's Fund Ins. Co. v. Thien*, 63 F.3d 754, 757-58 (8th Cir. 1995) (finding no abuse of discretion when district court admitted documents into evidence under business records exception because arguments to contrary went to credibility of witnesses, not admissibility of evidence, and thus were more appropriate for cross-examination than evidentiary objection); *Kehm*, 724 F.2d at 624 (distinguishing weight of evidence from admissibility of evidence).

V. Denial of Jury Trial

The corporate parties argue that the district court abused its discretion in denying their demand for a jury trial. The corporate parties ask that this Court reverse and remand to the district court for a new trial by jury. A district court's denial of a jury trial is reviewed for an abuse of discretion. *See Spear v. Dayton's*, 771 F.2d 1140, 1144 (8th Cir. 1985).

The corporate parties argue that they demanded a jury trial within ten days from the service of the "last pleading directed to such issue," which they argue fulfills the requirements of Fed. R. Civ. P. 38(b). The corporate parties contend that "the 'last pleading' directed to the issues in this case was the Answer to Plaintiff's Second Amended Complaint in which the Shelton Corporations rightfully demanded their jury trial." Brief for Appellants at 33. However, the United States' second amended complaint presented no new issues triable of right to a jury as to the corporate parties. The only

thing new about the second amended complaint was that Gregory Shelton was added to the complaint in his individual capacity. Thus, Gregory Shelton had the right to a jury arising out of the second amended complaint, but the other parties to the action did not. *See First Wisconsin Nat'l Bank v. Klapmeier*, 526 F.2d 77, 79-80 (8th Cir. 1975) (holding that defendant already waived jury trial on issues raised in original complaint, but could get jury trial solely on new issue raised in amended answer). The corporate parties had already waived their right to a jury trial by not demanding a jury trial within the required time period after the first amended complaint. Because the second amended complaint contained no new triable issues that pertained to them, the right to a jury trial under Rule 38 was not revived. *See* Fed. R. Civ. P. 38(d) ("The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. . . ."); *see also In re Yukon Energy Corp.*, 138 F.3d 1254,1260 (8th Cir. 1998) (affirming district court ruling that defendant waived right to jury trial because, "[e]ven if [defendant] requested a jury trial within ten days of [plaintiff's] final amended complaint, the essence of [plaintiff's] allegation against [defendant] was not changed by this amendment and remained unchanged throughout the course of the litigation").

Upon motion, a district court has the discretion under Fed. R. Civ. P. 39(b) to order a jury trial "notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made out of right. . .". Here, the corporate parties offered no justification for their failure to timely demand a jury trial. *See Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980) (affirming denial of relief from waiver of jury trial when party offered "no justification for the failure to make an appropriate demand" for jury trial). The corporate parties' argument that the district court should have excused their waiver because it was the opposing party, and not them, that filed the amended

pleadings is unpersuasive and not supported by the law. *See, e.g., Continental Bank & Trust Co. v. American Bonding Co.*, 605 F.2d 1049,1055 n.13 (8th Cir. 1979) (holding that defendant could not revive waived right to jury trial because opposing party's amended complaint did not add new issues triable by jury). We hold that the district court did not abuse its discretion in denying the corporate parties a jury trial.

VI. Conclusion

We hold that the FHSA extends to common fireworks and confers jurisdiction to the CPSC, that the Shelton parties' due process rights had not been violated because they had notice and opportunity for response, that the laboratory test reports were properly admitted into evidence under the business exception to the hearsay rule, and that the corporate parties waived their right to a jury trial because they did not file a timely demand. Accordingly, we affirm the orders of the district court in *Shelton I* and *Shelton II*.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1450/01-1599

GREG SHELTON; SHELTON WHOLESALE, INC., *et al.*,
Appellants,

vs.

CONSUMER PRODUCTS SAFETY COMMISSION,
UNITED STATES, *et al.*,
Appellees.

ORDER DENYING PETITION FOR APPELLANTS,
REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

March 29, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

NO. 93-6131-CV-SJ-6

UNITED STATES OF AMERICA
Plaintiff,

v.

SHELTON WHOLESALE, INC., A Missouri Corporation, d/b/a Shelton Fireworks; POLARIS FIREWORKS, INC., a Missouri Corporation, and GREGORY P. SHELTON, an individual,
Defendants.

FINAL JUDGMENT AND ORDER

Upon consideration of the United States' motion for final judgment under Federal Rule of Civil Procedure 54(b), and the certification made by the United States, that it will not pursue the remaining claim in this case, that is the civil penalty claim against the individual defendant, Gregory Shelton, if the Court of Appeals affirms the prior judgments and decisions of this Court and that only one jury trial will be had against all defendants if such a jury trial becomes necessary, the Court finds that entry of judgment will promote judicial efficiency and conserve judicial resources, and there is not just reason for delay in entry of final judgment.[1] It is therefore

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[1]The posture of the case is quite unusual, in that defendants earlier sought to appeal and the appeal was deemed premature. Now a procedural objection to the same practice is made by Gregory Shelton. A

ORDERED AND ADJUDGED that final judgment is entered on all claims previously decided by this Court, including the claims against defendants Shelton Wholesale and Polaris Fireworks decided in a Memorandum and Order on January 6, 1999, and the partial summary judgment granting an injunction against Gregory Shelton on September 21, 1999.

It is further ORDERED that the scheduled jury trial is cancelled.

/s/ _____
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

January 30, 2001

Kansas City, Missouri

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jury trial has been scheduled on the remaining issues deemed eligible for trial by jury. The United States has now disclaimed pursuit of the civil penalty action against Gregory Shelton if the earlier rulings are affirmed. Thus, the Gregory Shelton trial would become an unnecessary "test case", assuming affirmance. This would not serve anyone's interest. I recognize that a complete termination of the litigation would be somewhat deferred if there is a reversal on the judgment here entered, but on balance such delay (which is not itself complained of by Gregory Shelton) would be less onerous than the other possibility of a needless trial to a jury.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

SHELTON WHOLESALE, INC., a Missouri Corporation, d/b/a SHELTON FIREWORKS; POLARIS FIREWORKS, INC., a Missouri Corporation; and GREG SHELTON, an individual,
Defendants.

MEMORANDUM AND ORDER

Pending before the court is the CPSC's motion for summary judgment against defendant Greg Shelton personally. Following trial, post-trial briefing and oral argument, this court ruled in favor of the CPSC and against the corporate defendants in this case (and the related case of 97-6021-CV-W-6) in an order issued in January 1999 (the "January Order"), reported at 34 F.Supp.2d 1147.[1] Judgment was not, however, entered against Mr. Shelton because he had requested a jury trial. The CPSC's summary judgment motion attempts to avoid a second trial in this matter.[2]

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[1]The court had previously ruled cross-motions for summary judgment in the related cases on April 28, 1998 (the "April Order"), found at 1998 WL 251273.

[2]Another way to achieve this result might be to pursue Greg Shelton under an alter ego or corporate shell theory in collecting judgment against

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Poller v. Columbia Broadcasting System Inc.*, 368 U.S. 464, 467 (1962). To avoid summary judgment, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex*, 477 U.S. at 322-24 (1986) (non-moving party must come forward with sufficient evidence to demonstrate that there is a factual controversy as to contested element, or explain why such evidence is not currently available). The non-moving party must demonstrate "concrete evidence from which a reasonable juror could return a verdict in his favor." *Anderson*, 477 U.S. at 256. In all cases, however, the facts must be viewed in the light most favorable to the non-moving party, who must be given the benefit of all reasonable inferences which may be made from the facts disclosed in the record. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Raschick v. Prudent Supply, Inc.*, 830 F.2d 1497, 1499 (8th Cir. 1987). With these principles in mind, the court turns to an analysis of the CPSC's motion.

The CPSC argues that summary judgment is appropriate against Mr. Shelton under several different theories: (1) Shelton is liable because of his uncontested role in the corporations as officer, director and *sole* shareholder, relying on *United States v. Dotterweich*, 320 U.S. 277 (1943), and

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the corporations. Even if this would require a jury trial—a question not here addressed—the issues would be strictly confined to veil-piercing.

United States v. Park, 421 U.S. 658 (1975);[3] (2) Shelton is liable as a participant, relying on, *inter alia*, *United States v. Mac's Muffler Shops Inc.*, 1986 WL 15443 (N.D. Ga. Nov. 4, 1986); (3) Shelton is personally liable because his name appears on 11 of the 19 product invoices (Products 8-12 and 14-19); and (4) Shelton is liable as an "alter ego" of Shelton Wholesale and Polaris. Because the CPSC fails to adequately discuss or develop the "alter ego" theory in briefing—the CPSC's alter ego theory appears only as footnote 3 on page 6 of its briefing—the court considers it a "throw-in" at this stage of the controversy and will not analyze it herein.

The court will address the CPSC's remaining theories in reverse order. The CPSC's third theory of liability does not rely in the least upon Mr. Shelton's corporate or management position in the corporate defendants, but instead on the undisputed fact that his name appeared on the invoices and that he thus personally imported the products into the United States. As is evident from this court's previous orders, it is clear that little factually is required to establish the first aspect of liability under the FHSA. Here, it is undisputed that Mr. Shelton's name appeared as the importer/purchaser on the invoices for many of the products at issue in this case, that the products traveled in interstate commerce and that the test results showed that each of these products violated one or

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[3]As will be recalled, the court cited to and relied on certain language in *Dotterweich* to find Polaris, the corporation listed on the invoices for Products 1-7, liable, even though evidence suggested that all fireworks imported by the Shelton parties were ultimately sold through Shelton Wholesale. In *Dotterweich*, the Supreme Court stated that "The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of commerce adulterated or misbranded drugs." 320 U.S. at 284.

more of the CPSC regulations.[4] These facts, along with the court's prior rejections of the corporate defendant's legal defenses (which are identical to Mr. Shelton's) challenging the validity of the tests in the January Order and the court's rejections of other legal defenses raised by all the Shelton parties in its April Order, permit this court to conclude, short of a formal trial of the claim against the individual, that Mr. Shelton imported violative products and violated the FHSA with respect to the eleven products imported with his name on the invoice. On the undisputed facts present in the record, no reasonable jury could conclude otherwise. The court adds that Mr. Shelton has not indicated in his opposition suggestions or through accompanying affidavit that any of the evidence presented at the trial of the corporate defendants or in previous summary judgment motions is incorrect or unreliable. Nor does he assert that he possesses additional defenses (legal or factual) to the CPSC test, results.[5] The

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[4]These facts were undisputed in the summary judgment motions disposed of by the court in its April Order. The invoices showing Mr. Shelton's name as the importer/purchaser and the test results were also introduced as evidence at the corporate defendant's trial. There does not appear to be any legal bar to this court considering the testimony and evidence presented at the trial of the corporate defendants in disposing of the present summary judgment motion. Such evidence is akin to the more common Rule 56 summary judgment tool of using affidavit testimony, but with perhaps even greater indicia of reliability and trustworthiness. The trial testimony was made under oath in open court and the exhibits were properly introduced. The court can discern no reason, constitutional, statutory or otherwise, why such uncontroverted evidence should not be considered here. The court adds, as is explained more fully below, that it does not rely on any resolutions of conflicting testimony or judgments as to the facts that it may have made, explicitly or implicitly, in its January Order.

[5]The court observes that its conclusions in this regard are not on the basis of a collateral estoppel theory, but rather an application of undisputed material facts presented before and at trial (but not on resolutions of differing factual testimony resolved by the court in its

question of whether Mr. Shelton knowingly violated the FHSA, and is thus subject to civil penalties, is addressed *infra*.

The CPSC's second theory of liability, which relies on Mr. Shelton's participation in the offending corporate acts, is also a permissible basis for finding that he violated the FHSA. As this court has previously held, an offense under the FHSA is committed by all those taking a responsible part in the transaction outlawed by the statute. *See* January Order (*citing Dotterweich*, 320 U.S. at 284). It is undisputed that Shelton had a responsible share in importing all of the products at issue in this case. His name appears on the invoice for eleven of the products. *See supra*, note 1. He also participated in the importation of the other seven products by virtue of his position as a corporate officer of Shelton wholesale. Accordingly, under this theory of liability and with the court's rejection of the identical legal defenses raised by the corporate defendants, Mr. Shelton violated the FHSA with respect to all eighteen products at issue in this case.[6] Again, no reasonable jury could conclude otherwise.

January Order) to the statutory language of the FHSA. The court adds that a collateral estoppel theory is not urged by the CPSC and thus not adequately briefed by the parties. Such a theory may be inappropriate here because of Seventh Amendment and due process concerns articulated in Mr. Shelton's opposition suggestions. To the extent that the court ruled a corporate defendant's legal defense against it based in whole or in part because of resolutions by this court of differing testimony amongst the witnesses, such factual findings are not used by the court in the present ruling. The court's recollection is that a reconciliation of conflicting testimony was necessary only one time. *See* January Order at note 19 and accompanying text (rejecting Shelton's composite sketch on fuse burn testing in favor of Mr. Gasser's testimony on same subject).

[6]No evidence is tendered, by affidavit or otherwise, that any corporate agent other than Mr. Shelton was in any operative way an agent of one of the corporations in violating the applicable law. Since a corporation can

The CPSC's first theory of liability, based on Mr. Shelton's status as a corporate officer, also represents a permissible basis for attaching liability to Mr. Shelton for all eighteen products. In *Dotterweich* and *Park, supra*, the Supreme Court held that under the Federal Food, Drug and Cosmetic Act, which outlaws the interstate shipment of any adulterated or unbranded drugs, criminal sanctions could be imposed not only on the corporation, but on the corporate officers who have a "responsible relation" to the offending act (s) of the corporation. *Dotterweich*, 320 U.S. at 285. Consciousness of the wrongdoing by the corporate officer was held not to be a prerequisite to the imposition of sanctions under that statute. *Id.* at 281. Liability for the corporate officer was, in other words, strict once a determination was made that the officer had a "responsible relation" to the activity prohibited. This reasoning of *Dotterweich* and *Park* have been extended to *civil* penalty proceedings instituted under similar public welfare statutes. *See, e.g., United States v. Hodges X-Ray Inc.*, 759 F.3d 557, 561 (6th Cir. 1985).

Here, Mr. Shelton clearly bore a responsible relation to the activity prohibited—the importation of a banned or misbranded hazardous substance. It is undisputed that he was the sole shareholder, the chief corporate officer and that he made all the decisions for the defendant corporations relevant to the allegations in this case. Accordingly, under the reasoning of *Dotterweich* and *Park*, Mr. Shelton is liable for the importation of all eighteen products by virtue of his various corporate roles. No reasonable jury could conclude otherwise.

The court turns to the question of civil penalties. Unlike in *Dotterweich* and *Park*, where the possibility of criminal

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only act through agents, the violation seems necessarily attributable to Mr. Shelton.

sanctions attached under the statute once it was determined that the food was adulterated or unbranded (*i.e.*, consciousness of wrongdoing was not required), the FHSA makes a prerequisite to the imposition of civil penalties a finding that the defendant "knowingly violate[d]" its terms. One court has stated that "[i]n a crime having knowledge as, an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge." *United States v. McDonald and Watson Waste Oil Co.*, 933 F.2d 35, 55 (lst Cir. 1991). *But see United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 569 (1971) (officers were "under a species of absolute liability for violation of the regulations [proscribing knowing, failure to record shipment of chemicals] despite the 'knowingly' requirement. This, no doubt, is how Congress intended it to be.") (Stewart, J., dissenting). Although the stakes are obviously higher in a criminal case than in a civil proceeding such as that at issue here, the court agrees that something more than a mere status should be required before civil penalties are assessed against corporate officers for "knowing violations" of the FHSA.

In addition to satisfying this element by demonstrating actual knowledge, courts interpreting similar public welfare statutes that require knowing violations before criminal sanctions may be imposed have held that knowledge may be inferred for responsible corporate officers in appropriate circumstances. *See, e.g., United States v. Self*, 2 F.3d 1071, 1087-88 (5th Cir. 1993) ("while knowledge of prior illegal activity is not conclusive as to whether a defendant possessed the requisite knowledge of later illegal activity, it most certainly provides circumstantial evidence of the defendant's later knowledge from which the jury may draw the necessary inference"); *United States v. McDonald and Watson Waste Oil Co.*, 933 F.2d 35, 55 (1st Cir. 1991) ("We agree with the decisions discussed above that knowledge may

inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions"); *United States v. Johnson & Towers Inc.*, 741 F.2d 662, 669-70 (3d Cir. 1984) ("knowledge" in a Resource Conservation and Recovery Act criminal prosecution "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant").

Here, to the extent that the corporate defendants "knowingly" violated the statute, as previously concluded, 34 F.Supp.2d at 1161-4, the only corporate agent identified by the parties necessarily had the same "knowledge." That, however, was my conclusion as factfinder, not a conclusion that any reasonable juror would necessarily accept.

As I have observed before, we are dealing here with statutory language that considerably weakens the usual meaning of the term "knowingly," and "practically equates knowingly with 'carelessly' or 'negligently.'" 34 F.Supp.3d at 1161, n 31. Using the legal test most favorable to the Government, arguendo, I am being asked on summary judgment to conclude that the record would authorize a conclusion that Greg Shelton was negligent as a matter of law.

There are some occasions when questions of negligence, contributory or otherwise, can be ruled summarily. For example, *see Spinozzi v. ITT Sheraton Corp.*, 174 F.2d 842, 848-9 (7th Cir. 1999) (hotel guest, "moved by idle curiosity" during a power outage "strode on regardless" of complete darkness, falling into a maintenance pit). In general, however, it is very difficult to obtain a summary judgment ruling on an issue of negligence. The books contain almost no cases in which a plaintiff seeks a summary judgment ruling establishing negligence, much less obtains it. In words that Chief Judge Wollman used for the South Dakota

Supreme Court, "'ordinarily, questions of negligence [and] contributory negligence . . . are for the jury, provided there is evidence to support them. . . . The standards of conduct are for the court to determine, however, when the facts are not in dispute or of such a nature that reasonable men could not differ. . . ." *Didier v. J.C. Penney Co., Inc.,* 868 F.2d 276, 280 (8th Cir. 1989) (reversing summary judgment on an assumption of risk defense).

I need not review the arguments of the parties on the issue of corporate "negligence," if that term is used. Although I have ruled against the corporations as a factfinder, *evaluation* of the factual contentions seems distinctly more debatable than in *Didier*, for example. Such evaluation is the responsibility of a factfinder when a party chooses to demand a jury trial. Therefore, I cannot conclude on summary judgment that Greg Shelton "knowingly" violated the law and can be penalized without trial.

For the same reasons articulated in the January Order, an injunction against further importation of violative products is properly imposed against Mr. Shelton.

For the reasons stated, it is hereby

ORDERED that the CPSC's motion for summary judgment against Greg Shelton is granted in part and denied in part. His violation of the FHSA is established; whether the violation occurred "knowingly" cannot be determined as a matter of law. It is further

ORDERED that Shelton's alternative motion for reconsideration (Doc. No. 188) is denied. It is further

ORDERED that Greg Shelton is enjoined from knowingly or recklessly importing products violative of the FHSA and/or the CPSC regulations. It is further

ORDERED that the court has not and will not stay the injunction entered in January against Shelton Wholesale and Polaris or the injunction entered against Greg Shelton in this Order.

/s/_____
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: September 21, 1999

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 96-6131-CV-SJ-6

UNITED STATES OF AMERICA,
Plaintiff,

v.

SHELTON WHOLESALE, INC.,
A Missouri Corporation, d/b/a
SHELTON FIREWORKS;
POLARIS FIREWORKS, INC.,
a Missouri Corporation;
and GREG SHELTON, an individual,
Defendants.

No. 97-6021-CV-SJ-6

GREG SHELTON, SHELTONWHOLESALE, INC. and THE
NATIONAL FIREWORKS ASSOCIATION, LTD.,
Plaintiffs,

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
ANN BROWN and ERIC B. AULT,
Defendants.

MEMORANDUM AND ORDER

This matter is before the court following trial, post-trial briefing and oral argument concerning several items left

unresolved by this court's April 1998 summary judgment order (the "April Order"). Having heard the evidence, considered the parties' submissions and held oral argument the court will enter judgment in favor of the Government in both the Fine Case (Case No. 96-6131-CV-SJ-6) and the NFA Case (Case 97-6021-CV-SJ-6) for the reasons set forth below.[1]

I. Procedural Recap.

Before turning to the parties' trial and post-trial arguments, a brief recap of the 26-page April Order is appropriate. In that order, the court concluded, among other things, that: (1) the Consumer Product Safety Commission ("CPSC") possesses jurisdiction over common fireworks (April Order at 8-10); (2) the nineteen products at issue were introduced into interstate commerce the moment they left Hong Kong (*id.* at 10-11); (3) laches did not bar the CPSC from proceeding as to products 1-7 (*id.* at 11); (4) the CPSC's discretionary decision to permit Shelton[2] to sell five products that failed a CPSC test did not preclude enforcement action against Shelton based on those products (*id.* at 12-13); (5) making decisions about an entire shipment based on sampling is permissible under the FHSA (*id.* at 14-15); (6) no issue of fact existed in the *Fine* Case (Case

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[1]The court will not in this Memorandum and order restate the factual background. For that basic discussion, *see* April Order at 2-6. Consistent with Federal Rule of Civil Procedure 52(a) and to the extent made necessary by Shelton's largely legal challenges and defenses, the court will find the facts and make conclusions of law throughout this Memorandum and Order.

[2]For consistency's sake, this Memorandum and Order will continue to use "Shelton" to refer to the non-governmental parties, in these two related cases. The court does note, however, that Mr. Greg Shelton, who requested a jury trial in his answer to the CPSC's complaint, was severed from the May trial. *See* May 1, 1998, Order.

No. 96-6131-CV-SJ-6) concerning Shelton's allegation that the CPSC takes non-random samples based on visual clues (leakage and crooked sticks) because none of the products at issue failed the straightness test and there was no evidence that the CPSC purposely selected products 5 and 6 because they were leaking (*id.* at 16); (7) issues of fact remained in the *NFA* Case (Case No. 97-6021-CV-SJ-6) concerning Shelton's allegation that the CPSC takes non-random samples based on visual clues (*id.* at 16-17)[3]; (8) genuine issues of fact existed in both cases over whether valid statistical inferences could be drawn where sub-samples for stick straightness and rigidity tests were not selected randomly (*id.* at 17-18); (9) summary judgment was proper in favor of the Government on Shelton's due process claim (*id.* at 18-20); (10) questions of whether the CPSC's sampling techniques were faulty for failing to adjust for the numbers of devices within a particular shipment of product and whether the CPSC's fuse burn test was faulty must be reserved for trial (*id.* at 20-22);[4] (11) Shelton's challenge to the label requirement failed (*id.* at 21-22); (12) fact questions precluded decision on whether any violations were "knowing" (*id.* at 24); (13) summary judgment was proper on Count IV of the NFA Case, alleging "unjustified actions and

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[3]The court reserved ruling on whether such non-random sampling may nevertheless be found legal. *Id.* at 17, n. 21. Shelton is apparently satisfied by the trial testimony on this question. *See* Tr. 97 (Mr. Schoem testified that a device that was "obviously violative" would be collected, but "it would not be part of the random sample.") It failed to raise the point again in post-trial briefing or at oral argument. This point will not be discussed further in this Memorandum and order.

[4]This contention has apparently been dropped by Shelton. It was not brought out at trial, is not mentioned in Shelton's post-trial briefing and was not discussed at oral argument. It will not be discussed further in this Memorandum and Order.

threats" by the CPSC (*id.* at 24-25); and (14) it has jurisdiction over the NFA Case (*id.* at 25).

Just prior to trial, Shelton asked for reconsideration of the court's April Order respecting the due process claim. The court decided to take the motion with the case and to permit evidence concerning the due process claim at trial. The court also determined that the upcoming bench trial was inappropriate for Mr. Greg Shelton, as he had requested a jury trial in his answer to the Government's amended complaint adding him as a party defendant. *See* May 1, 1998, Order. After the week-long trial in mid-May as to the remaining two defendants, Shelton Wholesale and Polaris, and as directed by the court, the parties submitted deposition testimony, along with designations, objections, and counter-designations. Post-trial briefing followed in August, with responses filed in early October. The matter is before the court following November 5, 1998, oral arguments.

II. Shelton's Due Process Claim.

The court will first dispose of Shelton's renewed due process claim, which is asserted as a defense in the Fine Case and as an affirmative claim in the NFA case. Shelton argues that its due process rights have been violated by the CPSC and that as a result the CPSC should be barred from taking enforcement action against it for any claimed violations. In briefing before trial on this issue, Shelton principally claimed due process violations stemming from: (1) the CPSC' s decision to permit it to sell five of the products and then later pursuing injunctive relief based upon them; and (2) the CPSC's alleged failure to provide an independent finder of fact to review evidence submitted by Shelton following the initial determination by the CPSC. *See* April Order at 18-19. In reconsideration briefing, Shelton argues that its due process rights were violated because the CPSC failed to afford it an administrative *hearing*, where oral testimony may be introduced, after the initial determination is made that a

product violates the FHSA, contrary to 15 U.S.C. §2066(b), 15 U.S.C. §1273(a) and 16 C.F.R. §1500.268. Shelton also reasserts its non-neutral fact-reviewer argument, largely based on the lack of the allegedly statutorily provided hearing process.

Section 2066(b), which provides in relevant part that "the owner of [an imported] product shall be afforded an opportunity by the Commission for a hearing in accordance with the [Administrative Procedure Act], is a provision of the Consumer Product Safety Act ("CPSA"). According to 15 U.S.C. §2079, however, the CPSA applies to products subject to regulation under the FHSA only if "the Commission by rule finds that it is in the public interest to regulate such risk of injury under this chapter." The CPSC states without contravention that it has made no such ruling, and accordingly §2066(b) has no bearing on the due process issue here.

Section 1273(a) provides that after the delivery of samples from imported products to the CPSC, the owner of the product "may appear before the [CPSC] and have the right to introduce testimony." The regulation at issue, promulgated under §1273(a), provides:

> Hearing—(a) If it appears that the hazardous substance may be subject to refusal of admission, the area office director shall give the owner or consignee a written notice to that effect, stating the reasons therefor. The notice shall specify a place and period of time during which the owner or consignee shall have an opportunity to introduce testimony. . . . Such testimony shall be confined to matters relevant to the admissibility of the hazardous substance, and may be introduced orally or in writing.

16 C.F.R. §1500.268.

In briefing and at oral argument, both parties appeared to labor under the mistaken belief that if certain formal hearing requirements and procedures are required by §1273(a) or 16 C.F.R. §1500.268 (or, for that matter, §2066(b)), and the required hearing is not provided or the procedures not followed, a violation of constitutional due process automatically follows. *See* Shelton's Due Process Support Suggestions at 3-7; CPSC's Opposition Suggestions at 3-14. This is not the law. While it is true that those provisions could create in Shelton (and other importers) a constitutionally protected liberty or property interest,[5] and failure to provide the required hearing or follow prescribed procedures could constitute a violation of the statute,[6] what process is due (*i.e.*, the type of hearing, the procedures, etc.) is not measured under the terms of these provisions. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); Brown v. Frey,* 889 F.2d 159 (8th Cir. 1989); *Norris by Norris v. Board of Education of Greenwood Community School Corp.*, 797 F.Supp. 1452 (S.D. Ind. 1992).

Thus, merely because a statutory provision, regulation or agency protocol may call for an opportunity to introduce oral testimony, as here, appear at an administrative hearing before an Administrative Law Judge, as may be required under §2066(b), cross-examine witnesses, or engage in oral argument, constitutionally sufficient due process may be supplied with far less. In any event, the court notes that both *Sugarman v. Forbragd,* 405 F.2d 1189 (9th Cir. 1968), *aff'g*

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[5]The court need not resolve this question, as Shelton possesses a constitutionally protected property interest in the imported fireworks subjected to CPSC testing and found deficient.

[6]Whether the statutory and regulatory language in question was or is violated by the CPSC is not before the court.

267 F.Supp. 817 (N.D. Cal. 1967), and *Meserey v. United States*, 447 F.Supp. 548 (D. Nev. 1977), interpreted the Food, Drug, and Cosmetic Act, which contains both a statute (21 U.S.C. §381(a)) and regulation (21 C.F.R. §1.94(a)) identical in material respects to the statute and regulation at issue here, as not requiring a formal trial-type hearing.

The court thus turns to the ultimate question, whether the procedures actually provided by the CPSC supply the necessary due process. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Memphis Light, Gas and Water Division v Craft*, 436 U.S. 1, 14 n.15, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (*quoting Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). Indeed, "[t]he opportunity for informal consultations with designated personnel empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances." *Id.* at 16, n.17, 98 S.Ct. 1554. Here, the LOA notices given by the CPSC to Shelton, which state when and where "any information" is to be submitted, clearly put Shelton (and any other importer receiving a similarly worded LOA) on notice of a right to submit evidence to the CPSC.[7] *See* CPSC Exs. 1D-19D. As was obvious at trial, Shelton has had numerous contacts with CPSC personnel, particularly Mr. Gayman. *See, e.g.*, Tr. 422, 430-41. It may be safely said that other persons engaged in the business of importing fireworks have also had numerous contacts with CPSC personnel. Tr. 135. It is uncontroverted that the CPSC has the authority to correct mistakes. For these reasons, the court concludes that constitutionally sufficient due process is and was provided by the CPSC. The court

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[7]Shelton did not introduce any evidence at trial suggesting that LOA's supplied in other circumstances or to other importers do not include a similar notice.

will, however, briefly review each of the arguments Shelton makes against this conclusion.

Shelton previously argued in this case that a violation of due process exists because the person making the initial enforcement decision (Mr. Gayman in this case) reviews any evidence submitted in response to the LOA and determines whether the submitted evidence is sufficient to warrant reversal. As later briefing by Shelton reveals, however, this is not accurate. *See* Shelton's Reconsideration Suggestions at 3 (Ex. A thereto at 135-36); CPSC's Opposition Suggestions at 11. When Mr. Gayman receives information in response to a LOA, he forwards that material to CPSC headquarters in Washington where it is reviewed by CPSC compliance officers. *Id.* Alan Schoem testified at trial that an importer objecting to a CPSC conclusion could appeal that decision to Washington, going over Mr. Gayman's (or the person making the enforcement decision) head. Tr. at 132-33.[8] Accordingly, to the extent that Shelton continues to assert this argument, it is rejected.

Shelton argues that due process is not provided because any review requested does not involve CPSC retesting of fireworks. Shelton concedes, however, that the CPSC testified that it would retest if there was evidence that the testing was done incorrectly. Shelton's Reconsideration Support Suggestions at 3. Contrary to Shelton's assertion, that retesting has only rarely occurred does not necessarily

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[8]The court is not convinced that the CPSC's failure to memorialize this practice in writings submitted to the importer (*see* Tr. 134) undermines its constitutional effectiveness. According to Mr. Schoem's uncontroverted testimony, the CPSC is receptive to requests for review on high. Tr. 134. Shelton submitted no evidence that it sought such a review and was rebuffed. In the context of industry operations it is understandable that regulated parties may have little interest in making a "federal case" out of claimed violations.

evidence a lack of due process. Any number of explanations may be offered to explain the lack of CPSC retesting (lack of requests, lack of evidence of improper testing, etc.), and Shelton does not offer any evidence to exclude them from the realm of possibility. Accordingly, this point is ruled against Shelton.

Shelton also argues a violation of due process based on an alleged policy preventing an importer from conducting its own testing of fireworks initially found to be violative of the FHSA. *See* Shelton's Reconsideration Support Suggestions at 3; Shelton's May 26, 1998, Support Suggestions at 10. As Shelton concedes, however, *see* Shelton's May 26, 1998, Support Suggestions at 10, n.8, Mr. Gayman testified to the contrary. *See* Tr. 1099-1102 (stating that he granted the only request to take samples from a shipment held under customs bond). In addition, Shelton's argument fails to acknowledge that United States Custom Services Regulation 19 C.F.R. §19.8 permits examination and sampling of goods held in a bonded warehouse:

> Importers may, upon application approved by the port director on Customs Form 3499 examine, sample, and repack or transfer merchandise in bonded warehouse. Where there will be no interference with the orderly conduct of Customs business and no danger to the revenue prospective purchaser may be permitted to examine merchandise in bonded warehouses upon the written request of the owner, importer, consignee, or transferee.

19 C.F.R. §19.8. *See also* Declaration of Dawna J. Kutz, a Customs Service Fines, Penalties and Forfeiture Officer at 2 ("Any importer who makes such a request for testing purposes is permitted to sample merchandise that is under bond and/or seizure agreement or under a U.S. Customs hold.") (Attached as part of the CPSC's June 8, 1998, Suggestions in Opposition to Shelton's Motion For Summary

Judgment on the Due Process Issue). There is also evidence in the record that the bonding/seizure agreements signed by fireworks importers permit them to sample merchandise after securing the permission of Customs. *Id. See also* Attachment to Exhibit A to Shelton's June 26, 1998, Response to the CPSC's Opposition Suggestions on Due Process issue (a "Constructive Seizure Agreement" for a fireworks importer indicating that "movement or use" of imported product is permissible with Custom's approval).

The court also notes that Shelton has not offered any evidence of thwarted attempts to conduct independent testing by it or any other importer. Absent such evidence, and in light of Mr. Gayman's trial testimony, 19 C.F.R. §19.8 and the unrebutted testimony of Ms. Kutz, the court must rule this point against Shelton.

Shelton next argues a violation of due process because it is "impossible for any importer to properly respond to a LOA in 10 days." Shelton's Due Process Support Suggestions at 10. The CPSC counters, however, with evidence indicating that requests for extensions of time are routinely and regularly granted. *See* Deposition Testimony of Robert Poth at 133-34 (Attached as part of the CPSC's June 8, 1998, Suggestions in Opposition to Shelton's Motion For Summary Judgment on the Due Process Issue). Moreover, Shelton itself never asked for more time and has put forward no evidence suggesting that the CPSC has denied requested extensions in the past. The court therefore rules this argument against Shelton and stands by its earlier conclusion that constitutionally sufficient due process has been and is provided by the CPSC.

III. Products at Issue in the Corporate Proceedings.

Having rejected Shelton's due process argument, the court next must determine which corporate defendant is potentially liable for which products. The two corporate defendants are named on the invoices for Products 1-7 (Polaris) and 13

(Shelton Wholesale). On the other hand, Greg Shelton is listed on the invoices for Products 8-12 and 14-19.[9] The CPSC argues that liability for all of the products at issue may be placed at the feet of Shelton Wholesale because, regardless of the name on the invoice, all of the fireworks imported by any of the three defendants are ultimately sold by and through Shelton Wholesale. The CPSC is correct. *See* Tr. 350. In addition, evidence at trial established that Greg E Shelton only rarely personally sells fireworks, and, in those few instances, is selling them only to family and close friends. Tr. 339, 350-53. The evidence also demonstrates that Polaris likewise transferred all of the fireworks it imported to Shelton Wholesale. *See* CPSC Ex. 35 at 18, ln. 16-24 (selected excerpts from Mr. Shelton's Deposition). In addition, Greg Shelton was the sole shareholder, officer, and director of Shelton Wholesale, and correspondence with the CPSC concerning all of the products was conducted by Greg Shelton as an officer of Shelton Wholesale. Tr. 428-41; CPSC Exs. 44A, 75-81, 85 and 87. For these reasons, the court has little trouble concluding that Shelton Wholesale is potentially liable for all nineteen products.[10]

As to Polaris, the CPSC argues that it is potentially jointly and severally liable with Shelton Wholesale for products 1-7 as a participant in the importation of those products. The court agrees. Nothing in the statutory language of the FHSA suggests that only one person may be found liable for the

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[9]For a complete listing of the products, *see* Appendix A to this court's April Order.

[10]Shelton Wholesale cannot escape potential liability simply because the products ordered by Mr. Shelton or Polaris may not have actually been transferred to Shelton Wholesale. It is sufficient that in the general and usual course of events, Shelton Wholesale is the end-distributor of fireworks products imported from China by itself, Polaris or Mr. Shelton. Tr. 350.

importation of a particular banned product. Analogous case law interpreting the Federal Food, Drug, and Cosmetic Act suggests that all those participating in the process should be held responsible for illegalities. *See, e.g., United States v. Dotterweich*, 320 U.S. 277, 284, 64 S.Ct. 134, 88 L.Ed. 48 (1943) ("The offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs.").[11]

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[11]Although the court's holding as to Polaris suggests that Mr. Shelton may experience some difficulty in attempting to avoid responsibility for products imported under his name, the court makes no finding in this regard. A motion for summary judgment might allow resolution of personal liability without a jury trial replicating much of the evidence previously heard. Alternatively, the CPSC may attempt to circumvent a jury trial for Mr. Shelton by seeking enforcement of any judgment against Polaris and Shelton Wholesale through a veil-piercing proceeding. The court expresses no opinion on the procedural or substantive merits of such a strategy.

The court does note that the general presumption is that a subsidiary corporation is legally separate from its parent corporation and shareholders. *Williams v. McAllister Brothers Inc.*, 534 F.2d 19, 21-22 (2d Cir. 1976). However, "a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute." *United States v. Firestone Tire & Rubber Co.*, 518 F.Supp. 1021, 1039 (N.D. Ohio 1981) (*quoting P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 267 (6th Cir. 1970)). The law will not recognize corporate formalities used to circumvent a statutory policy or to violate a law. *Id.* Thus, where a violation of law is perpetrated through a corporate entity, the courts will intercede to hold the shareholder or parent corporation liable. *See Van Wyk v. Bergland*, 570 F.2d 701, 705 (8th Cir. 1978) (*quoting Bruhn's Freezer Meats v. United States Department of Agriculture*, 438 F.2d 1332, 1343 (8th Cir. 1971) ("[T]he corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute.")). Nevertheless, the court leaves the issues related to Mr. Shelton for another day.

The court finds *Dotterweich* persuasive and adopts that analysis for the FHSA statute in question. Accordingly, Polaris is potentially liable for Products 1-7.[12]

IV. Shelton's Attacks on CPSC's Testing Methods And Procedures.

Shelton lodges a variety of attacks on CPSC testing procedures. These deficiencies, Shelton argues, prevent the CPSC from proving that any of the products at issue in the Fine Case are banned or misbranded hazardous substances under the FHSA. In the NFA Case, Shelton argues that the deficiencies mandate entry of a declaratory judgment that the testing procedures are unlawful and void, and permanent injunctive relief preventing the CPSC from taking enforcement action against importers based on these testing methods. If Shelton's attacks are successful, the CPSC has failed to prove that Shelton imported defective products. On the other hand, if Shelton's attacks fail, Shelton is liable for importing defective products, *see, e.g.*, CPSC Exs. 1-19, and the court will consider whether a penalty should be imposed and/or injunctive relief awarded."[13] The court will review each of Shelton's attacks in turn.

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[12]As an aside, the court notes that the CPSC does not contend that Polaris is jointly and severally liable for Products 8-19. The CPSC did not put on evidence suggestive of Polaris participation respecting the importation of Products 8-19. Furthermore, veil-piercing between the two corporations is not urged by the CPSC, and no evidence was put forward directly bearing on that subject. Polaris' potential liability is, therefore, limited to products 1-7.

[13]The court is somewhat mystified by Shelton's largely unexplained argument that the CPSC "presented virtually no expert evidence of defective product." Shelton's Post-Trial Brief at 10. The court fails to discern why the CPSC needed to present expert testimony in support of its test results. The results themselves were admitted into evidence at trial, *see* CPSC Exs. 1-19; Tr. 76, 178, 417, 419, which is sufficient to shift the

A. The CPSC Is Entitled To Deference.

Before analyzing Shelton's attacks, the court notes that many (if not all) of Shelton's attacks emphasize that there are either "better ways" of implementing the regulations at issue than the method selected by the CPSC, or that the CPSC is testing products not contemplated by a particular regulation. *See* Shelton's Post-Trial Brief at 12-31. From briefing, it appears that Shelton believes that the CPSC is *not* entitled to any deference in implementing, interpreting and enforcing the FHSA. The word deference is conspicuously absent from Shelton's submissions. Consistent with that apparent belief, Shelton did not appear to acknowledge that deference was appropriate at oral argument.

Contrary to Shelton's evident belief, however, the CPSC is entitled to a substantial amount of deference in interpreting the regulations and implementing their objectives. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."). Review is for reasonableness only. *Id.* at 18, 85 S.Ct. 792. Even if the court would have adopted a better alternative of implementing a statute or regulation, the court is not permitted to substitute its judgment for that of the agency. *See, e.g., Chevron U.S.A. v. Natural Reources Defense Council, Inc.*, 467 U.S. 837, 843 n.11, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The deference afforded is particularly great when a court reviews agency decisions in technical and scientific areas. *See, e.g., Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997) (courts should

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burden to Shelton to present evidence as to why the results are in error. Shelton attempted to do this in a general fashion (as opposed to specifically attacking the results achieved as to a particular product at issue in this case) through its experts, Dr. Schneider and Dr. Chen.

"review scientific judgments of the agency not as the chemist, biologist, or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.") (internal quotations omitted); *New York v. Reilly*, 969 F.2d 1147, 1152 (D.C. Cir. 1992).

In addition, the statutes and regulations interpreted by the CPSC were enacted to protect the public's health and safety. Statutes and regulations protecting the public health and safety are to be construed liberally. *Tcherepnin v. Knight*, 389 U.S. 332, 336, 885 S.Ct. 548, 19 L.Ed.2d 564 (1967). As a result, the court considers that an even greater amount of deference to the CPSC's chosen methods and procedures is appropriate.[14]

B. Shelton's Attacks On CPSC Testing Methods And Procedures Fail.

Under this deferential standard, all of Shelton's attacks must fail. The court will discuss only the most vigorously advanced Shelton arguments in the following paragraphs.[15]

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[14]It may be worth noting, however, that judicial deference is neither blind nor deaf. Some of Shelton-NFA testimony and contentions were persuasive, and occasionally the CPSC, with its myriad responsibilities, seemed somewhat out of its depth. Although the agency is largely successful here, it is to be hoped that this litigation has been a useful learning process for the agency, and will promote some useful reforms—perhaps in cautious cooperation with regulated parties and knowledgeable persons. I acknowledge being well impressed by Dr. Schneider.

[15]The court has previously disposed of some of Shelton's attacks and does not (except in a couple instances) repeat that analysis here. *See* April Order at 16-18 and 20-22.

Before doing so, it is appropriate to briefly review and summarize the tests the CPSC performed on the products at issue here:

1. for all devices "intended to produce audible effects," dissection of and weighing of the "flash powder" or report charge in each device. The report charge can be produced by no greater than 2 grains (130 milligrams) of pyrotechnic composition (the "amount test"). *See* 16 C.F.R. §1500.17(a)(3).

2. for all "[r]eloadable tube aerial shell fireworks devices," measurement of width of shells with a caliper. The width can be no greater than 1.75 inches in outer diameter (the "size test"). *See* 16 C.F.R. §1500.17(a)(11)(i).

3. "for all fireworks devices that require a fuse," one technician lights the fuse and a second technician times the period from the lighting of the fuse to the ignition of the device with a stopwatch readable to .1 seconds. The fuse burn time could be no more than 6 seconds and no less than 3 seconds (the "fuse burn test"). *See* 16 C.F.R. §1507.3(a)(2).

4. for all "fireworks devices that require a fuse" that weigh less than eight ounces," fastening two of the devices together, lifting one of the devices by its fuse, and checking to see if the fuse separates from the device (the "fuse attachment test"). *See* 16 C.F.R. §1507.3 (b).

5. for all devices, if "leakage of the pyrotechnic composition" was visually observed after gentle shaking, collecting and measuring all the material that leaked from the device (the "leakage test"). *See* 16 C.F.R. §1507.5.

6. for all devices, lighting the device and visually observing its function to determine whether it

"functioned in a normal manner without burnout or blowout" (the "burnout/blowout test°). *See* 16 C.F.R. §1507.6.

7. for "rockets with sticks" (i.e., bottle rockets), clamping the part of the stick furthest from the driver to a board and measuring the stick's downward arch to determine whether the stick is rigid (the "rigidity test°). *See* 16 C.F.R. §1507.10.

8. for "rockets with sticks" (i.e., bottle rockets), laying the stick on a flat surface and measuring the upward arch to determine whether the stick is "straight" (the "straightness test"). *See* 16 C.F.R. § 1507.10.

9. visually inspecting device to evaluate compliance with regulations requiring specific labels (the "label test"). *See* 16 C.F.R. §1500.14(b)(7)(ix).

1. Fuse Burn Test.

Shelton first lodges a lengthy attack on the CPSC's fuse burn test. In conducting this test, one CPSC analyst lights the fuse with a punk while another analyst standing some distance away starts a stopwatch when he/she sees the fuse ignite. *See* Shelton's Post-Trial Brief at 12-13 (providing record citations); CPSC's Post-Trial Reply Brief at 10 (providing record citations). Shelton argues that the CPSC method is fraught with inaccuracy because the stopwatch holder is some distance (up to 20 yards) away and may not accurately see (or be signaled) that the fuse is lit, stops the watch when a "bang" is heard yet wears ear protection, and uses stopwatches calibrated by simultaneously starting and stopping two such watches (one in each hand) and comparing the times. *See* Shelton's Post-Trial Brief at 12-13.

The "better way" to test fuse burn times, according to testimony elicited from Shelton's expert witness Dr. Schneider, is to videotape the process of lighting the fuse

and review the tape later for violations.[16] This method is accurate to 1/30th of a second, and almost completely eliminates the possibility of errors. *See* Shelton's Post-Trial Brief at 16-17 (providing record citations). Shelton also argues that fuse burn time measurements should be averaged. *Id.* at 13-16.

The court rejects Shelton's attacks. First, Shelton's argument fails to acknowledge that the CPSC makes some adjustment for human frailty by incorporating a .3 second margin of error. *See* CPSC Ex. 26 at 4-5; CPSC Ex. 67; Tr. 189-92. In other words, only fuse burn times falling below 2.7 and above 6.3 (or 9.3) seconds[17] are considered failures. CPSC Ex. 26 at 5. Shelton also fails to acknowledge that the CPSC method considers the safety of its personnel in testing, by permitting ear protection and some distance between the device and the stopwatch holder. And, while it would obviously be preferable to videotape the process, doing so would take considerably more time, money and effort.

Shelton's attack also fails to acknowledge that Mr. Neal Gasser, who conducts most of the CPSC fireworks testing, Tr. 174, testified in his deposition that the stopwatch holder is within 10 feet of the device for large devices, within 3-4 feet for smaller devices and that in his experience hand signals

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[16]As it did before trial, the court rejects the CPSC's attempt to exclude from consideration Dr. Schneider's testimony. *See* CPSC's Post-Trial Brief at 28.

[17]The upper limit was changed from 6 to 9 seconds after the fireworks in this case were imported. *See* Tr. 192; 61 Fed. Reg. 67200 (noting December 20, 1996, amendment to 16 C.F.R. §1507.3(a)(2) lengthening upper time limit to 9 seconds). None of the fireworks devices at issue in this case involve the upper limit. Tr. 192.

were not used.[18] *See* CPSC's Post-Trial Reply Brief at 10 (providing record citations). The court finds Mr. Gasser's testimony particularly instructive on this point, and far more persuasive than the composite sketch Shelton compiled from selected portions of deposition testimony of three other CPSC employees.[19] For the reasons stated above and those set out in the CPSC's briefing, the court rejects Shelton's composite sketch. *See* CPSC's Post-Trial Reply Brief at 10-12.

Shelton's argument that the CPSC should average the results obtained would undermine the primary purpose of the FHSA and implementing regulations, to-wit, ensuring the safety of the consuming public. Under Shelton's argument, if a sample of eight yielded four devices that exploded instantaneously upon lighting and four devices that exploded ten seconds after lighting, the product would pass CPSC testing and extremely dangerous devices would be offered for public consumption.[20]

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[18]Shelton's efforts to exclude Mr. Gasser's testimony from this court's consideration must fail. Shelton is the party who admitted Mr. Gasser's entire deposition (with designations and counter-designations to follow in accordance with the court's established post-trial schedule) in the first place. *See* Tr. 1074. Subsequently, however, Shelton did not designate testimony from Mr. Gasser's deposition. The court concludes that the CPSC properly cited and relied upon Mr. Gasser's testimony in its June 2, 1998, filing of counter-designations responding to the composite sketch of fuse burn testing procedures set forth by Shelton's May 26, 1998, deposition designations of three other CPSC employees (*see infra*, note 19).

[19]Shelton's argument relies on selected testimony from three CPSC employees. *See* Shelton's Post-Trial Brief at 12-13 (relying on deposition testimony of Sonenthal, Chen and Booshan).

[20]Shelton argues that the CPSC's Fireworks Testing Manual ("Testing Manual"), CPSC Ex. 22 at 9, requires that fuse burn times be averaged. *See* Shelton's Post-Trial Brief at 15. Shelton is correct that the Testing Manual states: "Calculate average, standard deviation and range and

Shelton's argument that the CPSC's method of calibrating stopwatches is inappropriate must also be rejected. Shelton presented no evidence that the stopwatches used by the CPSC were or are in fact inaccurate.

Shelton's videotape method would obviously be a more accurate method of measuring fuse burn times. That is not, however, the point. Rather, the only question for the court is whether the CPSC methodology is so inexact and unreasonable as to justify judicial intervention. For the reasons stated above, the answer to that question is clearly no.

2. The Rigidity Test.

Shelton also attacks the CPSC's bottle rocket rigidity test. The rigidity test, which involves measuring the bottle rocket stick's flexibility, is the CPSC's method of implementing 16 C.F.R. §1507.10, which requires that bottle rockets "utilize a straight and rigid stick to provide a direct and stable flight." Shelton argues that the rigidity test does not measure direct and stable flight and that the "better way" of determining whether a rocket flies direct and stable would be to launch the selected bottle rockets into the air. *See* Shelton's Post-Trial Brief at 23-27.

Having reviewed the evidence on this point, the court cannot conclude that flexibility of the "guidance stick," as the bamboo shoot was termed by Dr. Schneider, has no impact on a bottle rocket's flight. It may be true that a curvature does not create danger of a "curve ball." But the CPSC's bottle rocket study confirms that stick straightness and rigidity

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record the data on the FT report." CPSC Ex. 22 at 9. *See also* Tr. 217-18. That the analyst is directed to make and report such calculations (which, as an aside, did not occur for any of the products at issue in this case) does not, however, mean that the CPSC must base its enforcement decisions on such data. The regulation at issue, 16 C.F.R. §1507.3(a)(2), does not mandate the use of averages.

correlates directly with the flight trajectory of bottle rockets. *See* CPSC Ex. 68 at 10-14.[21] Indeed, Dr. Schneider conceded at trial that the more straight and rigid the stick, the more likely that a bottle rocket will have a direct and stable flight. Tr. 977.[22] In addition, Shelton's method—firing rockets into the air and observing their flight—involves safety and fire issues not present with the CPSC's chosen procedure. Tr. 241. Finally, the court notes that Shelton's method is more subjective—and thus prone to error—than the method selected by the CPSC. For these reasons, the CPSC's method of testing for direct and stable flight survives this court's judicial scrutiny.

3. The Leakage Test.

Shelton's attack on the leakage test centers on the CPSC's alleged failure to distinguish between pyrotechnic composition and any other composition which may be found in the carton or bag, such as black powder from fuses, and that may actually be the cause of the ignition when the

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[21]Although the court at trial expressed some reservations about the admissibility of this study, it concluded at oral argument that the study could be admitted into evidence under Federal Rule of Evidence 803(8)(C). *See also* CPSC's Post-Trial Reply Brief at 22-24 (citing case law interpreting 803(8)(C)).

[22]Although the court does not recall the parties mentioning or debating this, it seems to the court that the rigidity aspect of the regulation is concerned with a bottle rocket that while placed in a container angled at 75 degrees relative to the ground actually is fired at a much lower angle to the ground because of a significant "droop" caused by a combination of a weighty rocket attached to a flexible stick. In other words, the bottle rocket does not proceed "directly," as measured from the angle of the launching device. Rockets not fired at sufficient angles to the ground may not achieve the height above ground necessary to prevent injury when the rocket explodes. In any event a flexible stick reduces control and, arguably, safety. Whether the reduced safety is significant is a matter for the agency, not the court.

material collected from the bag or carton is exposed to flame. *See* Shelton's Post-Trial Brief at 27-28; Tr. 238. *See also* CPSC Ex. 26 at 13. Shelton argues that language of 16 C.F.R. §1507.5 centers the inquiry only on leakage from the "pyrotechnic chamber in a fireworks device" and that the CPSC should therefore discern in the lab whether the material found in the bag or carton is pyrotechnic composition from the chamber.

Shelton's attack must be rejected. While the language of the regulation does suggest measuring only leakage of pyrotechnic material from the device's chamber, the underlying purpose of the regulation is much broader. The objective of the test is to ensure that devices don't leak highly flammable material that could form the ignition source of a fire generally, or the fuses of devices stored in the carton or bag specifically. Whether that ignition source is comprised solely of material from a device's chamber, or also from leaking fuses, the risk exists.[23] The CPSC's test addresses that risk. For this reason, the court does not believe that the CPSC's implementation of the regulation is unreasonable.

4. The Amount Test.

Shelton also attacks the CPSC's decision to take enforcement action on Products 5, 17 and 19 based on alleged violations of the "amount test." *See* 16 C.F.R. §1500.17(a)(3). Both sides agree that this regulation bans fireworks devices if they are intended to produce audible effects and the audible effect is produced by a charge larger than 2 grains (130 milligrams). *Id.* (applying to devices "intended to produce audible effects (including but not limited to cherry bombs, M-80 salutes, silver salutes, and other large firecrackers, aerial bombs, and other fireworks

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[23]The court notes that clay plugs and any paper wrapping from a device are not included in the material collected for testing. Tr. 238.

designed to produce audible effects . . .) . . . .”). Shelton argues that the regulation does not extend to “devices intended to produce visual effects.” Shelton Post-Trial Brief at 18.

Both sides agree that products 5, 17 and 19 are devices that produce aerial visual displays. *See* Shelton Post-Trial Brief at 20; CPSC’s Post–Trial Reply Brief at 15-17. Nevertheless, the CPSC argues that the regulation may be applied to these products. The court agrees Shelton’s argument inappropriately suggests that a given device may have only one intended effect, either visual or aerial. This is not accurate. A device may have more than one intended effect, and the CPSC’s decision that a particular device is designed to have an audible effect, and thus is subject to the “amount test,” would be and is entitled to substantial deference.[24] Warren Porter testified at trial that the CPSC determines whether a device is intended to produce an audible effect by firing the device and determining whether it goes “pop” or “poof” when the visual effect (generally stars) is seen or “boom” or “bang” when the visual effect occurs. Tr. 253. The CPSC measures only the material causing the “boom” or “bang.” Tr. 252. Shelton has not presented any evidence suggesting that the *only* intended effect of Products 5, 17 and 19 is visual.[25]

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[24]Any other interpretation of the regulation would have potentially dangerous consequences. Manufacturers could produce a device yielding a visual effect and couple with it material causing a huge explosion and “bang.”

[25]*Bivona v. Trollio*, 758 F.Supp. 125 (E.D.N.Y. 1991), relied upon by Shelton, is distinguishable on its facts, and, to the extent that it appears to give the CPSC little deference in determining what products may be regulated under 16 C.F.R. §1500.17(a)(3), the court declines to follow or adopt its analysis.

In addition, the same answer the court gave to Shelton's leakage test argument (i.e., igniting not just pyrotechnic chamber material but also fuse powder is a permissible interpretation of the regulation because the regulation's purpose is to prevent unintended and accidental ignition of loose powder from fireworks devices while still in the box) may be made in part answer to Shelton's attack on the CPSC's use of the "amount test" to find violations of Products 5, 17 and 19. While it may be true that the primary function and design of these devices is to explode while above the ground a good distance, accident, misuse, or product failure may result in those products being at or around ground level at the time the device explodes. By measuring the amount of pyrotechnic material used in creating the explosion of these devices (so that, among other things, the stars may be expelled from the cartridge), the CPSC provides a modicum of protection against the risk of consumer injury from accident, product failure, and misuse.

For these reasons, it is not unreasonable for the CPSC to test the amount of pyrotechnic material causing the "boom" in devices that also (or primarily) produce visual effects. Shelton's attack on the CPSC's decision to subject to the "amount test" those products that while producing an aerial and visual display also have an audible effect must therefore be rejected.

5. The Label Test.

Shelton next attacks the CPSC's reading of 16 C.F.R. §1500.14(b)(7)(ix) as requiring a label on every ball. See Shelton's Post-Trial Brief at 28-30. The court previously ruled this point against Shelton. See April Order at 22. Indeed, at that time, the court specifically noted that Shelton' s briefing did not make an issue of the regulation's interpretation. *See id.* at n.27.

Even if the court were inclined to overlook Shelton's earlier waiver of this issue, which it is not willing to do, the point must be ruled against it. The CPSC's interpretation of the regulation to require a label on every ball in Product 10 is reasonable and is entitled to deference. Trial testimony indicates that the balls comprising Product 10, "small festival balls," (a reloadable mortar-type device) may be ignited separately, Tr. 421 and 518, thus suggesting that a warning label would be and is appropriate on each individual ball and not just the outer packaging.[26] Indeed, the other "small festival balls" product at issue in this case (Product 8) was properly labeled, as were the other reusable mortar and shells products in this case, Products 1, 4, 6, and 11. *See* CPSC Exs. 1, 4, 6, 8 and 11 (no label violation noted). Shelton has failed to reconcile the fact that the other similar products at issue in this case were individually labeled with their legal argument that the CPSC misinterprets this regulation.

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[26]Shelton relies on *United States v. 7 Cases, Cracker Balls*, 253 F.Supp. 771 (S.D. Tex 1966), and 15 U.S.C. §1261(n), to support its position. This reliance is misplaced for several reasons. First, the regulation at issue was promulgated pursuant to 15 U.S.C. §1262 (b), which gives the CPSC the authority to issue "additional label requirements," not 15 U.S.C. §1261(n). Shelton's argument also ignores the very generalized language of 16 C.F.R. §1500.14(b)(7). It also ignores 16 C.F.R. §1500.121(a)(2)(i), which defines a container as "the immediate package from which a hazardous substance may be dispensed and also any article . . . which is necessary for the substance to function during actual use." *See also* 16 C.F.R. §1500.14(b) (7)(xv) (making §1500.121(a)(2)(i) applicable to mines and shells). Because *Cracker Balls, supra*, was decided before the regulations at issue here were promulgated, and because it involved very small balls about the size of a pencil eraser, whereas the product here involves balls about an inch and a half in diameter, the court finds it distinguishable and declines to follow it.

6. Sampling For The Straightness and Rigidity Tests.

Shelton renews its attacks on the CPSC's method of selecting the most crooked and least flexible bottle rockets for the sub-samples used in the straightness and rigidity tests. *See* Shelton's Post-Trial Brief at 20-23. In the April Order, the court concluded that a disagreement between the expert witnesses over whether valid statistical inferences could be drawn when the sub-samples were not randomly selected would have to be resolved at trial. *See* April Order at 17-18. The apparent disagreement, however, never materialized at trial. The CPSC's expert witness, Dr. Richard Madsen, testified that valid statistical inferences could be drawn from a non-randomly selected sub-sample if the number of products in the entire sample (120) were used to calculate the statistical inferences rather than the number of products in the sub-sample (12). Tr. 277. *See also* Tr. 273-78; 300.[27] The result of such treatment is that the range of possible defective products increases at a given confidence interval.[28] Tr. 274-

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[27]Shelton contends that the CPSC's method of using 120 as the sample size is flawed because it assumes that all 120 items were available to be selected for testing. *See* Shelton's Post-Trial Brief at 22. However, using a sample size of 120 for figuring statistical inferences can never hurt it. In other words, using a theoretical sample size larger than the actual sample size can only result in a broader range of potential defective products in a given population size for a given confidence interval. Thus, if two out of the ten selected failed the rigidity test, the number failing the rigidity test can never fall below two even if all 120 were available for and were tested. *See generally* Tr. 275-76. The "lower limit" at a given confidence interval cannot get lower. Tr. 276.

[28]As Dr. Madsen testified at trial, a confidence interval is "a lower number and an upper number that are derived mathematically in such a way that if you were to repeatedly use this process, then a certain proportion of the time (90% if you use a "90% confidence interval," 95% if you use a "95% confidence interval") the true population proportion would be contained between the upper and lower limits." Tr. 269. If,

76. Dr. Chen did not disagree with this analysis. *Cf.* Tr. 1012-14. Furthermore, both experts apparently agreed that a valid statistical inference could *not* be drawn if the sub-sample size (12) was used to figure the range of percentage of defective products in the entire shipment. *Id.*; Tr. 273-74; 301-02; 308-10.

Shelton contends that the CPSC devised this analysis "for purposes of this litigation in attempt to salvage what is clearly an unsupportable sampling program." Shelton's Post-Trial Brief at 21. While it may be that the CPSC devised this strategy during litigation, the court need not resolve the question. The fact remains that valid statistical inferences may be drawn from the larger sample size. In addition, in response to the court's questions, Dr. Madsen testified that non-random selection at the sub-sample level (as opposed to the initial sample level, which would render any results reached invalid) is not "novel," but instead represents "a pretty basic application of standard procedure." Tr. 298-99; 308. The key, he stated, is "to get the right denominator. The denominator is 120 and not 10." Tr. 309-10.

In addition, the court considers it important that there is no evidence in the record suggesting that the CPSC requires a certain percentage of crooked or flexible sticks before a product is considered a banned hazardous substance. On the contrary, Mr. Schoem testified that "there is no threshold" percentage above which the CPSC will take enforcement action and below which a shipment of product will be deemed legal and not banned. Tr. 100. He testified that "Under our regulations all products are required to comply with our

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using a 90% confidence level, the lower limit is 11% and the upper limit is 71%, 90% of the time the true number of defectives in a given population will fall somewhere between 11% and 71% of the total population (exactly where cannot be determined using a confidence interval). Tr. 272.

regulations." *Id.* Moreover, Shelton does not argue—and there is no evidence before the court—that the CPSC would not have taken enforcement action (i.e., exercised its enforcement discretion) on such a product if faced with two (or so) defective products out of 120 sampled. This point is ruled against Shelton.

7. The Size Test.

Shelton also takes issue with the CPSC's size test, which involves determining the widest possible diameter. *See* Shelton's Post-Trial Brief at 30-31; Tr. 244-45. Shelton's principal argument is that the size of a shell should be measured in a "better way," using the circumference of the shell to determine the shell's diameter, instead of using the largest diameter of the shell as measured by a micrometer. *See* Tr. 970-71. Shelton also argues that the minor violation here, .03 inches too large, is insignificant. *See* Shelton's Post-Trial Brief at 30-31.

The CPSC's defense of its measurement technique, that if a shell is too wide in any direction it could get stuck in the tube and explode on the ground, *see* CPSC Post-Trial Reply Brief at 28-29, is reasonable and entitled to deference. It also comports with a purpose of the regulation, the prevention of injuries. And, since even a shell only slightly too large in diameter could conceivably cause problems, Shelton's "minor violation" attack on the CPSC's size test must be rejected.

V. Shelton "Knowingly" Violated the FHSA.

Having determined that Shelton's attacks on CPSC testing procedures fail, and consequently the validity of the CPSC findings as to each of the products at issue in this case, the court must evaluate the appropriateness (Section V) and

amount (Section VI, *infra*) of a fine for the violations. The civil penalty provision of the FHSA, 15 U.S.C. §1264(c)(1), provides in pertinent part:

> Any person who knowingly violates section 1263 of this title shall be subject to a civil penalty not to exceed [$5,000 or $6,000] for each such violation . . . [A] violation of subsection (a) of section 1263 of this title shall constitute a separate offense with respect to each substance involved, except that the maximum civil penalty shall not exceed [$1,250,000 or $1,500,000] for any related series of violations.[29]

As that term is used in §1264(c)(1), "knowingly" is defined as:

> (A) having actual knowledge, or (B) the presumed having of knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of the representations.

15 U.S.C. §1264 (c) (5).

Both sides agreed at oral argument that no cases have interpreted §1264(c)(1)."[30] The CPSC does not contend that

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[29]For violations that occur after January 26, 1995, the maximums are $6,000 and $1,500,000. *See* 59 Fed. Reg. 66, 253-24 (1994). For violations on or before that date, the maximums are $5,000 and $1,250,000. *Id.* The higher figures apply only to Products 16 to 19. *See* CPSC Post-Trial Brief at 10-11, n.10.

[30]The court notes that 15 U.S.C. §2069 contains identical language to that found in Section 1264(c)(1) . A few reported cases cite to or discuss the pertinent language under §2069. *See, e.g., Aimone v. Walgreen's Co.*, 601 F.Supp. 507, 513 (N.D. Ill. 1985) ("knowingly" includes "disregard [of] reasonable safeguards involved in distributing the [product] or act[ing] without knowledge ascertainable upon the exercise of due care."); *Young v. Robershaw Controls Co.*, 560 F.Supp. 288 (N.D. N.Y. 1983);

Polaris or Shelton Wholesale possessed actual knowledge that the fireworks at issue here violated the FHSA at the time they entered the United States. *See* CPSC Post-Trial Brief at 11. The focus is instead on subsection (B). *Id.* It is far from a model of drafting clarity. Consistent with the court's general understanding of presumed knowledge, as used in other contexts, the court interprets Subsection (B) as imputing knowledge when a person fails to act reasonably in the circumstances, such as when they do not exercise due care. *See generally Aimone*, 601 F.Supp. at 513 (interpreting identical language found in 15 U.S.C. §2069); Eighth Circuit Manual of Model Criminal Jury Instructions §7.04 (1996) (jury may find defendant acted "knowingly" if he "deliberately avoided learning the truth" or "deliberately closed [his] eyes to what would otherwise have been obvious").[31]

The CPSC argues that there are several methods of exercising due care. *See* CPSC Post-Trial Brief at 11-16. Two involve testing the fireworks imported from China: (1) importers can test their own products for compliance with

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Advance Machine Co. v. Consumer Product Safety Comm'n, 666 F.2d 1166 (8th Cir. 1981), *reversing* 510 F.Supp. 360 (D. Minn. 1981).

[31]"Shelton argues that because "[t]he all-important disjunctive 'or' is not found within subsection B, but only between subsections A and B[,] [t]he term 'including' must therefore be interpreted as allowing due care as an element of presumed knowledge, but not to allow a lack of due care to serve as a substitute for knowledge." Shelton's Post-Trial Brief at 33-34 (footnotes omitted). The court is somewhat puzzled by Shelton's largely unexplained argument. Shelton did not reassert it at oral argument. The court's understanding of the language is that Shelton is presumed to know what a reasonable person would know or anything a reasonable person who exercised due care would know. The contorted statutory language practically equates "knowingly" with "carelessly" or "negligently."

CPSC regulations, both the ones that the CPSC tests and the ones that it does not ("self-testing"); (2) importers can have their fireworks adequately tested, pre-export, in China ("third-party testing"). *See* CPSC Post-Trial Brief at 11-14 (self-testing); *id.* at 14-15 (third-party testing). Third-party testing, the CPSC argues, can be accomplished by either having the supplier test the products it is supplying or hiring a third-party testing service, such as American Fireworks Standards Laboratory ("AFSL"). *Id.* at 14-15. The CPSC argues that testing—both self and third-party-serves to educate an importer about the relative compliance rates of different fireworks sold by different suppliers. *Id.* at 12. The CPSC also suggests that members of the American Pyrotechnics Association ("APA") are exercising some measure of care in the importation of fireworks. The APA disseminates a testing manual containing standards identical to the standards in the CPSC's regulations, advises its members of upcoming and current government regulations, and advises its members how to comply with CPSC regulations. *Id.* at 12—13 (providing record citations).

The CPSC argues that Shelton did not exercise due care. CPSC's Post-Trial Brief at 16-18. Evidence of the lack of due care, the CPSC argues, is found in the fact that Shelton does not generally test the products it imports for compliance with CPSC regulations. *Id.* at 12 (providing record citations).[32] Further evidence is found in Shelton's failure to

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[32]The CPSC argues that the testing that Shelton does - looking at the fireworks for physical damage suffered in transit and sometimes shooting the fireworks off in the parking lot— is not done to determine compliance with CPSC regulations. *See* CPSC's Post-Trial Brief at 16; CPSC Ex. 35 (Shelton Deposition) at 401 ("We go out and we test them by observing the boxes . . . we look at them, inspect them to make sure they are not damaged in any fashion . . . and then we would then begin to maybe shoot them if there is a question of the quality.") Tr. 373-74. Based on the record evidence, the court agrees with the agency. *See, e.g.*, Tr. 373-77

cease doing business with Hop Kee Pyrotechnics, Inc. ("Hop Kee"), a broker/exporter whose products (which may come from numerous manufacturers in China) have repeatedly failed CPSC testing and from whom Shelton continues to import the vast majority of its fireworks. *Id.* at 18-19. In addition, Shelton does not belong to the APA, Tr. 379, belong to any organization that conducts testing, Tr. 381, employ a safety or quality control director as do some other members of the NFA, *compare* CPSC Ex. 35 (Shelton Deposition) at 42-45; *with* CPSC Ex. 30A (Collar Deposition) at 42-45, utilize the services of the AFSL, Tr. 381, ask its main suppliers to conduct CPSC compliance testing, Tr. 383 and 751-52, or have any written test or quality control procedures, Tr. 376-77. *See also* CPSC Post-Trial Brief at 16-20 (providing additional record citations); 13-14 (outlining compliance activities of other NFA members; providing record citations).

Each time one of Shelton's products failed a CPSC test, the CPSC argues, Shelton had choices. They could have initiated a rigorous self-testing program, hired a third-party testing service, joined the APA, changed broker/exporters, demanded that the broker/exporter obtain products from a particular factory and/or complained to the broker/ exporters and pressured them to obtain products that would not fail the CPSC regulations. A reasonable person would have done something, the CPSC argues, and Shelton did nothing. *See* CPSC Post-Trial Brief at 16-20. In short, the CPSC argues

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(Shelton does not use, or at most occasionally uses, a stopwatch to measure fuse burn times, does not measure the amount of pyrotechnic composition in a fireworks device, does not measure a stick's rigidity and straightness, does not maintain any written records of any testing done, and only once in twenty years "flunked" a shipment of a product because of non-damaged product "malfunction"); CPSC Ex. 35 (Shelton Deposition) at 400-05, 413.

that Shelton chose to remain essentially ignorant of the quality of the fireworks imported and of the likelihood that fireworks obtained from any particular source would comply with the CPSC's regulations. The contention is that this is not reasonable, evidences a lack of due care and renders Shelton's violations of the FHSA "knowing."

In response, Shelton makes several arguments. *See generally* Shelton's Post-Trial Brief at 33-40. Shelton argues first that Products 1-7 were in fact tested in China by the supplier, *see* CPSC Exs. 1A-7A (invoices noting "Quality Testing" fee), and that there could thus be no knowing violation. *See* Shelton's Post-Trial Brief at 38. Shelton also argues that no civil penalties should be imposed for Products 1-7 because they were all imported in late March or early April 1992, and Shelton would have had no way of knowing that any of the products would be found defective, or any reason to think that some action on its part was necessary. *See* Shelton's Post-Trial Brief at 38.

Shelton further argues that although Products 1-7 could possibly form a basis for imputing knowledge for later shipments of products, such an analysis does not hold up on the facts of this case. *See* Shelton's Post-Trial Brief at 38-40. For example, products 1-4 were imported through broker/exporter Interoriental, yet none of the other violative products (8-19) were imported from that broker/exporter. *Compare* CPSC Exs. 1A-4A *with* CPSC Exs. 8A-19A. Also, Product 10 was imported through broker/exporter Panda and Product 13 through broker/exporter Anco, but no other products at issue were imported through either of them. *Compare* CPSC Exs. 10A and 13A *with* CPSC Exs. 8A-9A, 11A-12A and 14A-19A. And, Shelton argues, although

Products 5-6[33] were imported through broker/exporter Hop Kee, and so were later products (specifically 8-12, including Hop Kee's related company, broker/exporter Sunlight China), none of the later products at issue imported through Hop Kee failed the same CPSC test or were the same products previously found to violate the CPSC regulations. *Compare* CPSC Exs. 5C-6C and 5D-6D *with* CPSC Exs. 8C-12C and 8D-12D. Shelton argues that it defies logic to impute knowledge to it when Product 6 from Hop Kee failed a leakage test and three years later Product 17 from Hop Kee failed the fuse burn test. *See* Shelton's Post-Trial Brief at 39. Shelton also argues that pre-shipment testing may accomplish little because the fireworks can be damaged in transit, either by humidity, mishandling, shifting or crushing. *See* Shelton's Post-Trial Brief at 34, n.10.

The court agrees that the evidence fails to demonstrate, as to Products 1-7, that Shelton did "knowingly" import banned hazardous substances. There is no specific evidence that Shelton possessed information prior to that time that would have caused a reasonable person to take steps to ensure compliance with CPSC regulations."[34] Absent from the record is evidence that Shelton had prior run-ins with the CPSC, had itself discovered that fireworks it imported would have failed CPSC testing or evidence that Shelton was otherwise aware of the possibility that its fireworks may be found deficient. In other words, at the time Products 1-7

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[33]Shelton actually argues that Products 5-7 were imported from Hop Kee, but the invoice for Product 7 names "Hangkee" as the importer. *See* CPSC Ex. 7A. The court's review of the record has turned up no evidence that Hangkee and Hop Kee are the same or related companies.

[34]There is some general evidence that no Chinese fireworks should simply be assumed to meet CPSC standards. Giving Shelton the benefit of doubt— perhaps more than an experienced distributor should receive— I will not attribute such reasonable skepticism to Shelton in early 1992.

were found violative Shelton had no reason to have implemented a self-testing program, utilize third-party testing, join the NFA, implore its suppliers to ship only CPSC-compliant products, or take any other action to avoid importing violative fireworks. For this reason, the importation of nonconforming Products 1-7, each of which was a banned hazardous substance, was not "knowing" under §1264(c)(1).[35]

Having said that, however, the court accepts the CPSC's arguments and concludes that Shelton's other arguments must be rejected. After April 1992, Shelton cannot profess ignorance about importation risks or CPSC regulations. Shelton was armed with sufficient information to do something to *try* and prevent a repeat occurrence. Shelton instead chose to do nothing.[36] There is, for example, no

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[35]Accordingly, Products 1-7 will not be considered in determining the amount of fine to be imposed. Based on the court's earlier ruling that Polaris was potentially liable only for Products 1-7, *see supra*, Polaris will not be assessed a fine in this matter. In addition, the court will also exclude from consideration in determining the amount of fine for Shelton Wholesale Products 9, 13 and 18, for which the CPSC has indicated it is not seeking a penalty. The court notes, however, that importation of these violative products may nevertheless have been "knowing." *See* text.

[36]The court is unimpressed by Shelton's argument that because pre-shipment testing was performed on Products 1-7, it made efforts to comply with CPSC regulations. As a preliminary matter, the court notes that it has ruled on other grounds that Shelton did not "knowingly" violate the FHSA in importing Products 1-7. *See supra*, text. The pre-shipment testing of Products 1-7 has no bearing on whether *later* violative products were "knowingly" imported. First, beyond the notation "Quality testing," *see, e.g.*, CPSC Exs. 1A-7A, there is no indication in the record as to the nature of testing, if any, actually conducted. Whether testing for CPSC regulation compliance was conducted, or merely testing to ensure a quality product (straight labels, non-peeling paper, proper packaging, etc.) is unknown. Furthermore, based on Mr. Shelton's testimony, the pre-shipment testing of these products was not requested by Shelton but

evidence that Shelton notified its broker/exporters of the problems that occurred. Such a step would have been particularly appropriate to take with respect to Hop Kee, from whom Shelton ordered about 85% of its fireworks, Tr. 383, and from whom two of the products sampled by the CPSC in 1992 failed testing. *See* CPSC Exs. 5A and 6A. Shelton also could have joined the APA, enrolled in the AFSL testing program, instituted its own CPSC compliance testing program, insisted that its suppliers conduct CPSC compliance tests, or taken some other step(s) to help ensure the delivery of regulation-compliant products.

Obviously, any steps that Shelton may have taken would not have been foolproof. It is undisputed that problem fireworks will always slip through the cracks.[37] Problems in

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was forced upon it by the supplier. Indeed, Mr. Shelton testified that he did not request the testing. *See* CPSC Ex. 35 (Shelton Deposition) at 108, 510. Mr. Shelton also testified that "Most of my products, unless it was just a freak occurrence, they have not been AFSL tested." *Id.* at 390. Finally, the Product 1-7 testing was done when Shelton was, the court assumes (*see supra*, text), unaware of the possibility of compliance problems. After being put on notice that violations were possible, Shelton did not seek out third-party testing and third-party testing was not done, except perhaps in "freak occurrence[s]." For these reasons, the pre-shipment testing of Products 1-7 cannot immunize from a "knowingly" label later importations of violative products.

[37]"Consider, for example, Mr. Kellner's testimony at trial that he was not aware of a single importer who has not had a product fail a CPSC test. Tr. 753. Consider also that Mr. Gayman testified that he was not aware of a single supplier whose products had not failed CPSC tests. Tr. 498. At trial the court expressed the view that Mr. Kellner's testimony supported a "theory that really all the importers of fireworks are knowingly importing defective products when it seems to be conceded they all know that some of their products will be challenged and will be found to be defective." Tr. 1070. The court asked whether this was "enough to show the knowing importation of defective products." *Id.* By omission, however, the CPSC has chosen not to argue in post-trial briefing that a knowing violation should be based on such a theory. This is consistent with the position it

transit—product crushing, humidity, etc.—are always a potential problem. Testing—either self or third-party can never change that. Problem fireworks may slip through the AFSL, supplier and/or self-testing net. That this is true, however, is not the point. The point is that Shelton chose not even to try to comply with CPSC regulations after being put on notice that the potential for problems existed. A reasonable person in Shelton's position would have done something to ensure that the problems did not reoccur. In short, while fireworks devices that will fail CPSC testing will still be imported despite the prevention measures discussed above, at least the importer has taken some reasonable steps to keep the number of violative products to a minimum.[38] That is probably all that the law requires, at least as enforced by the CPSC.

It is no answer to say, as Shelton does, that no product ever failed the same test in the same way and that the importation of each particular banned product could not have been "knowingly" done. The point is, rather, that Shelton failed to take any steps to comply with the law. Under the logic of Shelton's argument, an importer could avoid a "knowingly" violation for decades simply by shifting amongst the various suppliers, changing the products ordered from each and trusting that the CPSC never uncovered the same exact violation on the same exact product from the same exact

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has apparently taken during this litigation that it simply wants fireworks importers to exercise some degree of care to minimize the importation of defective fireworks.

[38]For these same reasons, it is also no excuse to say, as Shelton does, that: (1) because the CPSC takes the position that it is not bound by non-CPSC test results relying on AFSL or supplier testing does an importer no good; or (2) because a fireworks device enters interstate commerce the minute it leaves for the United States a United States based self-testing program does an importer no good.

supplier (the odds of which are incredibly low considering the CPSC's limited enforcement resources and the number of imported products).

VI. The Fine.

The court must next determine the appropriate fine for Shelton's knowing violations of the FHSA. *United States v. Advance Machine Co.*, 547 F.Supp. 1085, 1094 (D. Minn. 1982) ("the amount of the penalty will ultimately be a matter for the Court."). Both sides apparently agree that the maximum fine in this case is $1,500,000, the maximum amount that may be imposed for a series of related violations. *See* CPSC's Post-Trial Reply Brief at 35; Shelton's Post-Trial Brief at 41. The CPSC appears to believe a fine of $1,500,000 would be appropriate on the facts of this case. Shelton argues that only a nominal fine should be imposed.

To begin, the court must determine the appropriate method of calculating the fine. Three basic methods of calculating the fine are at least arguably appropriate: (1) one violation for each "banned" product shipped, for a total of 9 violations (19 products total less products 1-7, 9, 13 and 18); (2) one violation for each shipment containing a "banned" product, for a total of 7 violations; and (3) one violation for each defective fireworks device contained in a particular shipment of product that failed CPSC testing. *See generally* Shelton's Post-Trial Brief at 42.

The CPSC argues in favor of the third approach, while Shelton argues for the second approach.[39] Because the second approach incorrectly fails to consider that there may be multiple products within a shipment violative of the CPSC

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[39]Shelton argues that the products personally imported by Mr. Greg Shelton should be excluded when calculating the fine amount. For the reasons stated *supra*, this argument is unsound.

and because it fails to recognize that a particular product may fail several CPSC tests, the court declines Shelton's invitation to adopt it. The court also finds the first approach an inappropriate method of calculating the fine. As the products at issue here demonstrate, a particular product may be comprised of anywhere from several hundred to several million individual devices. The potential harm to the end users varies with the number of devices in a particular shipment.

As described below, the third method is the most logical as well as the fairest measure of the appropriate fine. It also has the added benefit of comporting with 15 U.S.C. §1264, which provides that a "separate offense" occurs "with respect to each substance involved." A "hazardous substance" is defined as "Any substance or mixture of substances which . . . is flammable or combustible." 15 U.S.C. §1261(f)(1)(A). Since each fireworks device is flammable or combustible, each device constitutes a separate offense.

Under this method, the failure rate within the sample permits drawing statistical inferences about the failure rate within the population as a whole at the 90% confidence level.[40] Using the failure number at the low end of the confidence interval, which represents not only a conservative but also fair method of proceeding, a total fine amount may be arrived at by multiplying the per device fine (*see infra*) by the total number of failures within the shipment of product. *See* CPSC Ex. 42 (revealing the number of violations at issue for each product). As revealed in CPSC Ex. 42, the total

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[40]For those tests that do not permit statistical inferences to be drawn based on the test results (e.g., the leakage test), a different method of calculating the fine would be appropriate. The court need not settle on the appropriate calculation, however, as the method discussed in the text functions adequately for all of the products involved in this action.

number of defective products imported is 142,328.[41] The court has previously determined that only 117,303 of them (the failed devices in Products 8, 10-12, 14-17 and 19) may be utilized in figuring the penalty.[42]

It remains to be decided how much of a fine per imported defective device is appropriate. Under 15 U.S.C. §1254, the CPSC must take into account certain criteria in calculating the amount of fine to be sought:

> In determining the amount of penalty to be sought upon commencing an action seeking to assess a penalty for a violation of section 1263 of this title, the Commission shall consider the nature of the substance, the severity of the risk of injury, the occurrence or absence of injury, the amount of the substance distributed, and the appropriateness of such penalty in relation to the size of the business or person charged.

Although these factors are directed to the CPSC and not the court they are helpful in guiding the court's analysis and should, if applicable on the facts of a particular case, be considered in determining the amount of penalty.

Given the nature of fireworks as explosive devices, the severity of the risk of injury would seem to be high. There is, however, no evidence before the court that any injuries have occurred. As testimony at trial established, Shelton

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[41]This number is derived from adding the numbers contained in the low number column.

[42]Product 10 failed the label test. None of the individual balls in the sample bore the required label. Accordingly, all 43,200 devices are used in calculating the figures cited above (the court recognizes that 43,200 is probably a low number considering that each fireworks device probably had more than one small festival ball, but an error on the low side seems appropriate in this case).

Wholesale reaped very large profits and should have the ability to pay a large fine.[43] Tr. 582-83.

Considering the several-year period of repeated violations, Shelton's continued use of broker/exporter Hop Kee without any apparent attempt to induce Hop Kee into making improvements in the products it provided Shelton, Shelton's failure to implement any meaningful CPSC compliance self-testing program or use supplier or other third-party CPSC compliance testing, or take other steps (hire a quality control director, join the APA, etc.) to correct problems, the court might normally settle on a per device fine amount of $3.00, for a total fine of $351,909.

It is my understanding, however, that this is not a routine fine-collection litigation. It is apparently a test-case, for which the industry has not previously prepared. It has been unusually costly to defend. Under these special circumstances I will use a fine of $100,000.[44]

Consistent with this court's ruling earlier in this opinion that Shelton Wholesale is responsible for all of the Products at issue in this case, *see supra*, the entire amount of the fine will be and hereby is levied against Shelton Wholesale. Consistent with Mr. Polonica's testimony at trial that Shelton Wholesale could not pay a lump sum fine amount, Tr. 575, Shelton Wholesale will be permitted to remit this sum to the United States in equal annual installments over the next four years with the first installment due and owing on August 1,

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[43]This assumes, perhaps contrary to fact, that there has been no corporate or business manipulation to avoid responsibility for a fine, or to use the company as a funnel for money diverted to Mr. Shelton.

[44]Judicial notice is taken of a $60,000 fine being paid in an agreed settlement of a similar controversy involving a St. Joseph, Missouri, company, with a roughly comparable sales volume. *Missouri Lawyers Weekly*, December 14, 1998.

1999.[45] In light of the court's ruling *supra* that the importation of Products 1-7 was not "knowing" and, independently, because of Mr. Polonica's testimony at trial that Polaris is not in a position to pay a fine, Tr. 574, the court will not impose a fine on Polaris.

VII. The CPSC Is Entitled To Injunctive Relief.

The CPSC also seeks relief in the form of an injunction against further importation of violative products. The FHSA authorizes such relief. *See* 15 U.S.C. §1267(a). When the Government seeks an injunction pursuant to statute to protect the public health, the requirements applicable to private litigants in equity do not apply. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); *United States v. City of Painesville, Ohio*, 644 F.2d 1186, 1193 (6th Cir. 1981). The Government need not show irreparable harm, *W.T. Grant*, 345 U.S. at 633, 73 S.Ct. 894, or inadequate remedy at law. *City of Painesville*, 644 F.2d at 1193. Moreover, because the availability of injunctive relief in the statute reflects a congressional finding that the balance of the equities tips in favor of injunctive relief, the court need not balance the equities. *See Hecht Co. v. Bowles*, 321 U.S. 321, 331, 64 S.Ct. 587, 88 L.Ed. 754 (1944) (in statutory injunction case, "the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief"). The Government meets its burden for injunctive relief upon establishing that a violation of the statute has occurred and that there is some likelihood that future violations may occur. *See W.T. Grant*, 345 U.S. at 632, 73 S.Ct. 894. The

[45]In order to avoid placing Shelton Wholesale in a poor cash flow position, the court has concluded that the annual installments should be paid to the United States at the conclusion of Shelton Wholesale's annual "busy season" of June and July.

availability of injunctive relief in a federal statute such as the FHSA reflects the finding of Congress that a violation of the statute will result in harm to the public, and should be restrained. *See United States v Diuapulse Corporation of America*, 457 F.2d 25, 28 2d Cir. 1972).

Shelton's history of past violations of the FHSA and the likelihood that it will continue to violate the FHSA warrant injunctive relief.[46] The threat of recurrent violations is apparent in the recalcitrance of Shelton after repeated notifications of violations by the CPSC. Unless enjoined by the court, Shelton may well continue its violative conduct, and continue to expose the public to the risks associated with violative fireworks. Therefore, Shelton Wholesale and Polaris will be and hereby are enjoined from knowingly[47] or recklessly importing fireworks devices violative of any and all CPSC regulations.

VIII. Conclusion.

For the reasons stated, it is hereby

ORDERED that judgment is entered in favor of the CPSC and against Shelton Wholesale in the Fine Case (96-6131-CV-SJ-6). It is further

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[46]Testimony at trial indicated that Polaris is no longer actively used to import fireworks or conduct business. Tr. 369. Because its future status is not known, however, injunctive relief against it is nevertheless appropriate. Mr. Shelton testified that he believed Shelton Wholesale would continue to be used to import fireworks. Tr. 369.

[47]"Knowing" violations will be determined in any future contempt proceedings based on normal usage, not the special statutory definition. Since a reckless violation is more easily proved, but appears to be more difficult to establish than a statutory violation, it is not likely the parties will be exposed to contempt proceedings in a harassing manner.

ORDERED that judgment is entered in favor of the CPSC and against Polaris in the Fine Case (96-6131-CV-SJ-6). It is further

ORDERED that Shelton Wholesale shall pay a fine to the United States in the Fine Case (96-6131-CV-SJ-6) of $100,000, with the first of four equal annual installments due on August 1, 1999. It is further

ORDERED that both Shelton Wholesale and Polaris are enjoined from knowingly or recklessly importing products violative of the FHSA and/or the CPSC regulations. It is further

ORDERED that Shelton's motion for summary judgment on Count V in the NFA Case (97-6021-CV-SJ-6), Shelton's due process claim, is denied. Judgment is entered in favor of the CPSC on Count V of the NFA Case (97-6021-CV-SJ-6).

/s/_____
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: January 6, 1999.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 96-6131-CV-SJ-6

UNITED STATES OF AMERICA,
Plaintiff,

v.

SHELTON WHOLESALE, INC.,
a Missouri Corporation, d/b/a
SHELTON FIREWORKS;
POLARIS FIREWORKS, INC.,
a Missouri Corporation;
and GREG SHELTON, an individual,
Defendants.

No. 97-6021-CV-SJ-6

GREG SHELTON, SHELTONWHOLESALE, INC. AND THE
NATIONAL FIREWORKS ASSOCIATION, LTD.,
Plaintiffs,

UNITED STATES CONSUMER PRODUCT SAFETY
COMMISSION, ANN BROWN AND ERIC B. AULT,
Defendants.

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. This action came to trial before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED.

Judgment is entered in favor of the CPSC and against Shelton Wholesale in the Fine Case (96-6131-CV-SJ-6).

Judgment is entered in favor of the CPSC and against Polaris in the Fine Case.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 96-6131-CV-SJ-6

UNITED STATES OF AMERICA,
Plaintiff,

v.

SHELTON WHOLESALE, INC., a Missouri corporation, d/b/a SHELTON FIREWORKS; POLARIS FIREWORKS, INC., a Missouri corporation; and GREG SHELTON, an individual,
Defendant.

No. 97-6021-CV-SJ-4-6

GREG SHELTON, SHELTON WHOLESALE, INC. and THE NATIONAL FIREWORKS ASSOCIATION, LTD.,
Plaintiffs,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, ANN BROWN and ERIC B. AULT,
Defendants.

ORDER

After an unrecorded telephone discussion with counsel and consistent with the memorandum to counsel filed April 28, 1998, it remains my opinion that Greg Shelton as defendant has a right to jury trial that was timely invoked, and that the corporate defendants do not. There is no jury trial right in the suit filed by Greg Shelton, *et al.*

Empaneling a jury would be extremely awkward, as would framing jury issues in the claims against Mr. Shelton. A separate and later trial regarding claims against him seeks appropriate. The court's authority to separate and defer the claims against Mr. Shelton is based on Rule 42(b), F. R. Civ. Proc.

It is understood that all testimony involving claims based on transactions nominally with Mr. Shelton will be presented by the United States on a theory that there would be corporate liability. The Court will hear such evidence and determine the factual and legal issues. Any recovery over against Mr. Shelton for corporate liability (or conceivably for individual actions not traceable to corporations) will be heard in a jury trial at a later date, if the United States prevails in its claim against the corporations. It is therefore

ORDERED that the Clerk cancel any call to a jury panel; the parties are relieved from filing papers suitable for a jury trial; and filings scheduled for this week may be filed Monday, May 4, 1998.

/s/_____
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: May 1, 1998.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 96-6131-CV-SJ-6

UNITED STATES OF AMERICA,
Plaintiff,

v.

SHELTON WHOLESALE, INC., a Missouri corporation, d/b/a SHELTON FIREWORKS; POLARIS FIREWORKS, INC., a Missouri corporation; and GREG SHELTON, an individual,
Defendants.

No. 97-6021-CV-SJ-4-6

GREG SHELTON, SHELTONWHOLESALE, INC. and THE NATIONAL FIREWORKS ASSOCIATION, LTD.,
Plaintiffs,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, ANN BROWN and ERIC B. AULT,
Defendants.

MEMORANDUM AND ORDER

Pending before the court are cross-motions for summary judgment in each of these related cases.[1] In 96-6131-CV-SJ-6 (the "Fine Case"), the United States brought suit against Gregory P. Shelton ("Mr. Shelton"), Shelton Wholesale, Inc. ("Shelton Wholesale") and Polaris Fireworks, Inc. ("Polaris")[2] for alleged violations of the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1261 et seq. All three defendants are involved in the importation and sale of fireworks to the public. The United States contends that certain shipments of fireworks imported between 1992 and 1996 contained fireworks products that were, in one way or another, defective under fireworks regulations enacted pursuant to the FHSA (the "Fireworks Regulations") and enforced by the United States Consumer Products Safety Commission ("CPSC"). Based on these claimed violations, the United States seeks prospective injunctive, relief and civil penalties.

In 97-6021-CV-SJ-6 (the "NFA Case"), Mr. Shelton, Shelton Wholesale and the National Fireworks Association, Ltd. ("NFA"), a coalition of fireworks importers and distributors, brought suit against the CPSC in five counts seeking declaratory and injunctive relief based on one 1995, one 1996 and one 1997 shipment of bottle rockets (called

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[1] Also pending before the court are several motions seeking leave to file briefs in excess of local rule page limits. *See* Document ## 72 and 75 in 96-6131-CV-W-6 and Document # 71 in 97-6021-CV-W-6. These motions are granted and the clerk is directed to file the documents attached to these motions.

[2] For purposes of this Memorandum and Order, Mr. Shelton, Shelton Wholesale and Polaris will be collectively referred to as "Shelton."

"Whistling Moon Travellers" or "Moon Travellers").[3] Count I alleges that the CPSC has no jurisdiction over consumer, or common, fireworks such as those at issue in the Fine Case and NFA Case. Count II alleges that Shelton did not violate the FHSA with respect to the 1995 Moon Travelers product and the 1996 Whistling Moon Travellers product. Count III alleges, among other things, that the CPSC selects for sampling fireworks devices within a product shipment that skew results, fails to take a representative number of samples, and has other difficulties with testing procedures. Count IV alleges "unjustified actions and threats" by the CPSC violative of the Administrative Procedures Act. Finally, Count V alleges a due process violation based on various allegations.

Factual Background

In the late 1970's, Mr. Shelton began selling fireworks in the State of Missouri. Over time, his operation has grown, such that now he owns and controls several Missouri corporations, including Shelton Wholesale and Polaris, all of which, directly or indirectly, are in the business of selling fireworks to the public. Shelton imports its fireworks from Hong Kong, China.

Between March 1992 and March 1996, the CPSC, which is charged with the task of ensuring compliance with the FHSA and the Fireworks Regulations, selected various products for testing from twelve shipments imported by Shelton from Hong Kong, China, to a United States Customs Port. After the products were selected, samples were taken from them, and the remainder of the selected product was released to a Shelton facility after Shelton posted a bond. The CPSC

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[3] The court denied preliminary injunctive relief in the NFA Case in May 1997. *See* April 10, 1997, Memorandum to Counsel; May 8, 1997, Order.

allowed the importation and sale of the remainder of the products contained in each shipment (*i.e.*, the products that the CPSC did not select for sampling and testing).

The CPSC's yearly "Fireworks Program," an internal agency memorandum, provides guidance to investigators and CPSC Compliance Officers by setting out the method for selecting fireworks samples from shipments:

> If the smallest retail unit of the products is a single device, collect 19 units . . . as the official sample. If the smallest retail unit of the product is two or more devices, collect 11 retail units as the official sample. The 19 units should be selected at random from at least 10 different shipping cases where available within the shipment (8 different shipping cases where available if 11 units are being collected). Each of the shipping cases should be taken from a different section of the shipment. Do not take more than two units from one shipping case.

Ex. 21 to CPSC's Fine Case Summary Judgment Motion[4]

After selecting samples, the CPSC transported the samples to its laboratory to conduct performance tests aimed at determining whether the selected fireworks were safe for consumers. The tests performed by the CPSC fall into two broad categories, field testing and bench testing. Field testing involves setting the fireworks off outdoors. Bench testing

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[4] This case involves fireworks of both types, *i.e.*, those for which the smallest retail unit is a single device and those for which the smallest retail unit is two or more devices. Retail units can contain one or more individual fireworks devices of the same type; for example, a retail unit of bottle rockets typically contains twelve packages of twelve individual bottle rockets (144 individual bottle rockets).

involves physical measurements inside the laboratory. The field and bench tests performed on the selected fireworks included, among others:

- for all devices 'intended to produce audible effects,' dissection of and weighing of the 'flash powder' or report charge in each device. The report charge can be produced by no greater than 2 grains (130 milligrams) of pyrotechnic composition (the "amount test"). *See* 16 C.F.R. § 1500.17(a)(3).

- for all '[r]eloadable tube aerial shell fireworks devices,' measurement of width of shells with a caliper. The width can be no greater than 1.75 inches in outer diameter (the "size test"). *See* 16 C.F.R. § 1500.17(a)(11)(i) .

- for all fireworks devices that require a fuse, one technician lights the fuse and a second technician times the period from the lighting of the fuse to the ignition of the device with a stopwatch readable to .1 seconds. The fuse burn time could be no more than 6 seconds and no less than 3 seconds (the "fuse burn test"). *See* 16 C.F.R. § 1507.3(a)(2) .

- for all "fireworks devices that require a fuse that weigh less than eight ounces," fastening two of the devices together, lifting one of the devices by its fuse, and checking to see if the fuse separates from the device (the "fuse attachment test") . *See* 16 C.F.R. § 1507.3(b) .

- for all devices, if 'leakage of the pyrotechnic composition' was visually observed after gentle shaking, collecting and measuring all the material that leaked from the device (the "leakage test"). *See* 16 C.F.R. § 1507.5.

- for all devices, lighting the device and visually observing its function to determine whether it 'functioned in a normal manner without burnout or blowout' (the "burnout/blowout test"). *See* 16 C.F.R. § 1507.6.
- for 'rockets with sticks' (i.e., bottle rockets), clamping the part of the stick furthest from the driver to a board and measuring the stick's downward arch to determine whether the stick is rigid (the "rigidity test"). *See* 16 C.F.R. § 1507.10.
- for 'rockets with sticks' (i.e., bottle rockets), laying the stick on a flat surface and measuring the upward arch to determine whether the stick is "straight" (the "straightness test"). *See* 16 C.F.R. § 1507.10.
- visually inspecting device to evaluate compliance with regulations requiring specific labels (the "label test"). *See* 16 C.F.R. §1500.14(b)(7)(ix) .

From the products that the CPSC selected to sample, its tests revealed violations with respect to nineteen of them (leading them to file the complaint in the Fine Case). More specifically, thirteen products failed the "fuse burn" test, six failed the "stick rigidity" test, three failed the "leakage" test, three failed the "amount" test, two failed the "burnout /blowout" test, one failed the "fuse attachment" test, one failed the "size" test, and one failed the "label" test. The CPSC found thirty violations in all, with nine of the nineteen products failing more than one test. For more detail, *see* Appendix A. Because the sample of the product failed to pass all of the CPSC's tests, the CPSC determined that the entire shipment of each product was a "banned hazardous substance" under the FHSA and further determined that product number 10 (out of 19) was also a "misbranded hazardous substance" because it failed the "label" test.

Each time the CPSC found a Fireworks Regulation violation, it informed Shelton by way of a Letter of Advice ("LOA") . Each of the ten LOA's (some LOA's itemized more than one product's violation(s)) informed Shelton of its opportunity to be heard, three by stating that Shelton could submit contrary evidence or views and seven by incorporating by reference Chapter 2 of the CPSC's "Regulated Products Handbook" (the "Handbook"),[5] which also indicates that Shelton could submit contrary evidence or views. Shelton submitted one letter challenging the CPSC's finding with respect to two of the nineteen products, but the CPSC determined that Shelton's response did not negate the CPSC's findings.

Respecting fourteen of the nineteen products, the CPSC negotiated with Shelton for Shelton to either destroy, re-export or recondition the product. The CPSC allowed Shelton to sell to the public the remaining five products, but admonished Shelton to take steps to prevent such violations in the future.[6]

Standards for Summary Judgment

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy.

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[5] Four of these seven LOA's included a copy of the Handbook.

[6] The NFA Case involves a 1997 shipment of Whistling Moon Travellers. This product is not one of the nineteen products that formed the basis for the Fine Case complaint, although the two other products focused on in the NFA Case (a 1995 shipment of Moon Travellers (product 14) and a 1996 shipment of Whistling Moon Travellers (product 18)) are. The CPSC eventually determined that the 1997 Whistling Moon Travellers was not a banned or misbranded hazardous substance.

New England Mut. Life Ins. Co. v. Null, 554 F.2d 896, 901 (8th Cir. 1977). Summary judgment motions are not disfavored, however, but are instead "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 447 U.S. 317 (1986). Accordingly, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Poller v. Columbia Broadcasting System Inc.*, 368 U.S. 464, 467 (1962). Summary judgment is particularly appropriate where unresolved issues are primarily legal rather than factual. *Aucutt v. Six Flags Over Mid-America Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996). With these principles in mind, the court turns to an analysis of defendant's motion.

Analysis[7]

Under the FHSA, banned and misbranded hazardous substances cannot be introduced or delivered for introduction into interstate commerce. 15 U.S.C. § 1263 (a). The CPSC issued the Fireworks Regulations (cited above) to assist it in determining whether a fireworks device was a banned hazardous substance (*see, e.g.*, 16 C.F.R. § 1500.17(b) and 16 C.F.R. § 1507) or a misbranded hazardous substance (*see, e.g.*, 16 C.F.R. 1500.14(b)(7)(ix)). As noted, the CPSC determined that all nineteen products failed one or more of

[7] To a great extent, the Fine Case and NFA Case are closely related. For example, the parties incorporate by reference into their briefing in the Fine Case many arguments raised in the NFA Case. Therefore the court will not separately discuss the two cases but rather will separate the arguments and the two cases where appropriate.

the fireworks tests and, accordingly, labeled each a banned hazardous substance (and, in addition, labeled product 10 a misbranded hazardous substance).

The FHSA provides that:

> Any person . . . knowingly violat[ing] section 1263 of [the FHSA] shall be subject to a civil penalty not to exceed $5,000 for each such violation. Subject to paragraph (2), a violation of subsection[ ](a) . . . of section 1263 of [the FHSA] shall constitute a separate offense with respect to each substance involved, except that the maximum civil penalty shall not exceed $1,250,000 for any related series of violations.

15 U.S.C. § 1264(c)(1). Pursuant to this provision, the CPSC brought suit against Shelton seeking civil penalties (of a yet undisclosed amount), claiming that Shelton "knowingly" violated the FHSA. The CPSC also seeks permanent injunctive relief restraining future violations of the FHSA under 15 U.S.C. § 1267(a), relief that does not require that Shelton "knowingly" violated the FHSA.[8]

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[8] The CPSC has moved for summary judgment on the issue of liability only (*i.e.*, whether the nineteen products were banned hazardous substances and, in the case of product 10, a misbranded hazardous substance). The CPSC does not in its motion or supporting suggestions contend that summary judgment is appropriate on the issue of whether Shelton "knowingly" violated the FHSA. *See* CPSC's Fine Case Support Suggestions at 1, n. 1 ("This motion seeks summary judgment only on the issue of liability, not on the issue of civil penalties or other remedies. . . . A finding of liability is a sufficient predicate for entry of an injunction ordering [Shelton] to cease violating the FHSA. [Shelton's] state of mind is not a relevant issue here and will only be relevant at a later stage . . . ."). Strangely, the CPSC does suggest in its opposition suggestions to Shelton's motion for summary judgment that summary judgment on both liability and damages (*i.e.*, a knowing violation) should be granted in its favor. Because the court concludes that genuine issues of fact exist as to

Shelton makes numerous arguments in defense to the CPSC's civil enforcement action, and in support of the claims it has made in the NFA Case, which the court will address in the paragraphs below.

A. CPSC Jurisdiction Over Common Fireworks.

As a defense to the Fine Case complaint, and as Count I of the NFA Case complaint, Shelton argues that the CPSC lacks jurisdiction over common fireworks such as those at issue in these related cases. *See* Shelton's NFA Case Support Suggestions at 15-23. Shelton first raised this issue in briefing to the court last year in seeking preliminary injunctive relief in the NFA Case. The court expressed initial misgivings about this argument in denying injunctive relief to Shelton. *See* April 10, 1997, Memorandum to Counsel at 2 ("I advise the parties that I also have certain concerns about the merits of plaintiffs' legal point now under submission."). An examination of the pertinent statutory language reveals that these misgivings were correct. Section 1261(q)(1) provides, in pertinent part, that:

> The term 'banned hazardous substance' means (A) any toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible to access by a child to whom such toy or other article is entrusted; or (B) any hazardous substance intended, or packaged in a form suitable, for use in the household, which the [CPSC] by regulation classifies as a 'banned hazardous substance' on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this chapter for that substance, the degree

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whether Shelton knowingly violated the FHSA, *see infra*, the court need not decide whether to overlook the CPSC's tardiness.

> or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce: Provided, That the [CPSC], by regulation, . . . (ii) shall exempt from clause (A), and provide for the labeling of, common fireworks (including toy paper caps, cone fountains, cylinder fountains, whistles without report, and sparklers) to the extent that it determines that such articles can be adequately labeled to protect purchasers and users thereof.

15 U.S.C. § 1261(q)(1) (bold emphasis added; italics in original). Shelton argues that this statute provides a clear exemption for common fireworks that can be adequately labeled and that there is no dispute in this case as to whether the fireworks in question are adequately labeled. Shelton then argues that the CPSC has ignored this statutory language and its mandate that the CPSC exempt common fireworks from its regulations.

This argument lacks merit. By its very terms, Clause A automatically bans certain articles that contain hazardous substances. Absent a statutory exemption, it is clear that common fireworks would have been automatically banned as a hazardous substance. Just because Congress opted to exempt common fireworks from the automatic ban provision in Clause A does not mean, however, that Congress also intended to prohibit all governmental regulation of common fireworks. To the contrary, Clause B permits the CPSC to conclude that, notwithstanding cautionary labeling, the degree or nature of a hazard is such that the public health and safety requires that the product be kept out of the channels of interstate commerce. Pursuant to Clause B, the CPSC

enacted the Fireworks Regulations described *supra*. *See United States v. Focht*, 882 F.2d 55, 57-59 (3d Cir. 1989).[9] Based on the above reasoning, and the Third Circuit's reasoning and analysis in *Focht*, the court concludes that the CPSC possesses jurisdiction to regulate the common fireworks at issue in this case pursuant to authority found in Clause B of 15 U.S.C. § 1261(q)(1).[10] Accordingly, the court rejects this argument as a defense to the CPSC enforcement action and enters summary judgment in favor of the CPSC on Count I in the NFA Case.

B. Introduction Into Interstate Commerce Of A Banned Hazardous Substance Or Misbranded Hazardous Substance.

Shelton argues that § 1263 of the FHSA requires that the CPSC prove that the fireworks were misbranded or banned hazardous substances at *the time they were introduced into interstate commerce*. *See* Shelton's Fine Case Opposition Suggestions at 8-12. Shelton argues that the products were not banned hazardous substances or misbranded hazardous substances until the CPSC performed its tests and that

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[9] Perhaps because of the Third Circuit's decision in *Focht*, *see* 882 F.2d at 59, n. 9, Shelton does not argue that the CPSC lacks authority to regulate fireworks under Clause B because Clause B seems to suggest that it only applies to hazardous substances "intended, or packaged in a form suitable, *for use in the household*." 15 U.S.C. § 1261(q)(1)(B) (emphasis added).

[10] Other than the statutory construction argument addressed and rejected above, Shelton relies on two cases. For reasons the court finds unnecessary to fully discuss in this opinion, Shelton's reliance on *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977), and *United State v. Chalaire*, 316 F.Supp. 543 (E.D. La. 1970) is misplaced. Suffice it to say that neither court squarely addressed the issue presented in this case, nor even touched upon the permissible extent of federal restrictions allowed on common fireworks.

thereafter the products were not introduced into, and did not move through, interstate commerce. *Id.* at 9.[11]

This argument must be rejected. The tests that the CPSC performs do not convert the products into banned or misbranded hazardous substances, they merely reveal their true identity. The fact that they were not sold, distributed, or moved through interstate commerce after their identity as banned or misbranded hazardous substances was revealed does not shield them from the reach of the FHSA, because the products were introduced into interstate commerce the moment they left Hong Kong. *See, e.g., United States v. 2,998 Cases of Food*, 64 F.3d 984, 988-89 (5th Cir. 1995).

C. Whether The Equitable Doctrine Of Laches Bars The CPSC From Taking Enforcement Action Based On The 1992 Products (1-7).[12]

Shelton argues that laches precludes the CPSC from seeking civil penalties against Shelton based on the 1992 violations (products 1-7). *See* Shelton's Fine Case Support Suggestions at 12-13. Shelton's primary contention is that it has been prejudiced because the CPSC destroyed the remaining samples from these products. *Id.* This argument must be rejected because the doctrine is generally

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[11] As part of this argument, Shelton asks how it can be "held liable for something that no one, not even the CPSC, knows to exist" until after testing? *Id.* The court concludes that this argument is more appropriately considered when examining whether plaintiff "knowingly" violated the FHSA. *See infra.*

[12] Shelton also argued that the statute of limitations barred the CPSC from proceeding against Shelton based on the 1992 products. *See* Shelton's Fine Case Support Suggestions at 10-12. Shelton has now, however, conceded that its argument was misplaced. *See* 28 U.S.C. § 2462 (establishing a five-year statute of limitations for enforcement actions).

inapplicable against the government in claims for legal relief such as civil penaltics when the suit is brought within the applicable statute of limitations. *See, e.g., United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Mack*, 295 U.S. 480, 489 (1935).[13]

D. Decision Of CPSC To Permit Shelton To Sell Five of The Nineteen Products As Undermining CPSC's Attempt To Take Enforcement Action Based On Those Products.

Shelton argues that because the CPSC allowed it to sell five of the products at issue,[14] those products were obviously not banned hazardous substance and can not provide a basis for either injunctive relief or civil penalties. *See* Shelton Fine Case Support Suggestions at 13-14; Shelton Fine Case Opposition Suggestions at 15. Shelton relies in part on letters the CPSC sent to Customs advising Customs that there was no violation and that Customs could release the shipments to Shelton. The CPSC admits that it permitted these five products to enter the United States, and that Shelton was allowed to sell them, but contends that this act of "enforcement discretion" on its part did not remove the violation that it found and that the products were nonetheless "banned hazardous substances." In any event, the CPSC argues, it does not seek civil penalties based on these products, but only relies on them to support its claim for

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[13] Although the doctrine conceivably could be applied as a bar to injunctive relief, the court concludes that application of this harsh defense in this case would be inappropriate.

[14] For Products 2, 3, 9, 13 and 18, the applicable LOA advised Shelton that, although the product failed the CPSC fuse burn test, the CPSC was admitting this item (and thereby permitting Shelton to sell it) despite the violation but that Shelton should "correct this violation in the future manufacture and importation of this device." *See* Exs. 2, 3, 9, 13 and 18 to CPSC's Fine Case Motion For Summary Judgment.

injunctive relief. *See* CPSC Fine Case Opposition Suggestions at 6-11; CPSC Fine Case Reply Suggestions at 6.

Shelton does not attack generally the CPSC's "enforcement discretion" policy, nor suggest that the policy was inappropriately applied in these five cases.[15] The court concludes as a matter of law that this policy of enforcement discretion does not result in these products losing their label as "banned hazardous substances," nor does it undermine the CPSC's attempt to seek injunctive relief based, in part, on them.[16] A certain amount of agency discretion in handling what it determines to constitute "minor" or less serious violations seems both necessary and appropriate, and is not at odds with the Congressional policies underlying the FHSA.

Accordingly, the CPSC may rely on these products at trial in its request for injunctive relief. Further, based on this conclusion and the conclusion reached *supra* with respect to Shelton's allegation that its products were not introduced into and did not travel in interstate commerce, summary judgment in favor of the CPSC and against Mr. Shelton, Shelton Wholesale and the NFA on Count II of the NFA Case is appropriate.[17]

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[15] The policy obviously inured to their financial benefit in each case and it would have been disingenuous for Shelton to suggest in this litigation that the policy is inappropriate.

[16] Because the CPSC does not seek civil penalties based on these products, because *any* violation of the FHSA is a sufficient predicate for injunctive relief under 15 U.S.C. § 1267(a), and because there are numerous other claimed violations that, by themselves, are sufficient to warrant the entry of injunctive relief if the court concludes at trial that such relief is required to prevent further violations of the FHSA, Shelton's contention has, at bottom, no bearing on the Fine Case.

[17] Count II of the NFA Case claimed that Shelton did not violate the FHSA with respect to the 1995 Moon Travellers product (product 14) and the 1996 Whistling Moon Travellers product (product 18). In the NFA

E. CPSC's Alleged Violations of The Administrative Procedures Act.

Shelton argues that the CPSC has two policies that violate the Administrative Procedures Act ("APA"). The first policy is condemning millions of fireworks based on a "few isolated samples [that] fail a CPSC performance test." Shelton's NFA Case Support Suggestions at 27. Shelton claims that the CPSC's second policy is taking non-random samples. *Id.* at 27-28. Shelton claims that these violations of the APA preclude the CPSC from taking enforcement action against it and, in the NFA Case, that this court should declare these policies unlawful and enjoin further enforcement actions based on sampling and/or non-random sampling. The court will address these arguments in turn.

1. Condemnation of Shipment of Product Based on Failure of Sample.

As previously stated, Shelton claims that it is unlawful for the CPSC to condemn a whole shipment of a product based on the failure of a few firework devices taken from a sample

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Case complaint, plaintiffs alleged that the 1995 Moon Travellers product (product 14) was never introduced into interstate commerce, and the 1996 Whistling Moon Travellers product (product 18) was released by the CPSC to Shelton after testing and was thus not a banned hazardous substance. Because the court has ruled these arguments against Shelton, summary judgment in favor of the CPSC is appropriate. Summary judgment is not inappropriate as to Count II merely because Shelton claims in Count II that it did not knowingly violate the FHSA. Whether there was a knowing violation of the FHSA is not germane to Count II, but does have bearing on the outcome of the Fine Case. *See infra.* Moreover, what has been said in the text disposes of Shelton's argument in the NFA Case that the CPSC "has admitted" that the 1996 Whistling Moon Travellers product (product 18) and the 1997 shipment of Whistling Moon Travellers are not banned hazardous substances. *See* Shelton's NFA Case Support Suggestions at 28-29.

of the product.[18] The CPSC readily concedes that it makes enforcement decisions about entire shipments of a particular product based on samples and argues that the FHSA expressly authorizes the use of sampling. The CPSC is correct. 15 U.S.C. § 1273(a) provides, in pertinent part:

> The Secretary of the Treasury shall deliver to the [CPSC], upon its request, samples of hazardous substances which are being imported or offered for import into the United States. . . . If it appears from the examination of such samples or otherwise that such hazardous substance is a misbranded hazardous substance or banned hazardous substance . . ., then such hazardous substance shall be refused admission, except as provided in subsection (b) of this section. The Secretary of the Treasury shall cause the destruction of any such hazardous substance refused admission unless such hazardous substance is exported. . . .

15 U.S.C. § 1273(a).

Shelton argues that this statute is inapplicable because it only "deals with actions the. CPSC may take against a product prior to such product" entering the United States. Shelton's NFA Case Support Suggestions at 6. This argument, which is based on a misreading of the statute, must be rejected. The CPSC does not lose its authority to sample a product merely because it *enters* the United States and is

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[18] Shelton's argument is basically that only the sample of the product that fails the CPSC test may be labeled a banned hazardous substance prohibited by the FHSA. The remaining portions of the product should not be so labeled. Taken to its logical end, Shelton's argument would require the CPSC to test (and thereby destroy) every fireworks device in a shipment of product. For practical reasons, if for no other, sampling would appear to be the only prudent means of testing for banned hazardous substances.

sitting on United States soil. Indeed, subsection (b) of § 1273 clearly contemplates that the product may be delivered to the importer/owner, after execution of a bond, pending testing by the CPSC.[19]

2. Non-random Sampling.

The other policy that Shelton takes issue with is the CPSC's alleged failure to randomly select samples. The CPSC strenuously disagrees with Shelton's position that the CPSC does not gather random samples. The CPSC argues that Shelton has no proof that it has a policy of taking non-random samples, and that there is, in addition, no proof that non-random samples were taken from Shelton's fireworks shipments.

Shelton alleges that Samuel Hall, a CPSC Compliance Officer, testified that the CPSC regularly selected samples from the main shipment of products that "appeared" as if a

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[19] In the NFA Case, Shelton argues, and the CPSC admits, that the 1995 shipment of Moon Travellers (Product 14) "was permitted to enter the United States and a U.S. Customs hold was not placed on this shipment." Shelton's NFA Case Support Suggestions at 10, ¶ 46. This shipment, and apparently only this shipment, forms the basis for Shelton's argument that § 1273 is inapplicable. There is, however, no evidence in the record that would indicate that the 1995 shipment of Moon Travellers (Product 14) was "admitted" into the United States, as that term is used in § 1273. Even assuming that the 1995 Moon Travellers shipment (Product 14) was "admitted" into the United States, the court does not believe that an APA violation results merely because notice and hearing may not have been provided Shelton concerning a CPSC policy of sampling "admitted" fireworks. Section 1273 obviously put Shelton, and other fireworks importers, on notice that the CPSC would be sampling imported fireworks, and the court is still left with the unshakable impression that there is no alternative to enforcement through sampling. Shelton's distinct but related argument that the condemnation of the 1995 Moon Travellers' shipment (Product 14) violated its due process rights because of the requirements of 15 U.S.C. § 1265 is without merit.

violation would be found.[20] There is, however, no evidence that this procedure was utilized to select the samples for the products at issue in the Fine Case. Indeed, such a visual inspection would only reveal apparent violations of the stick straightness and leakage tests, and only two of the products at issue in the Fine Case failed the leakage test (product 5 and 6), while none failed the stick straightness test. There is no evidence that the CPSC purposely selected "leaking" products for its samples of products 5 and 6 (and, in addition, product 5 had two other violations). Accordingly, the court can not conclude that Mr. Hall's statement, even if it represents CPSC policy, creates a genuine issue of *material* fact in the Fine Case. In the NFA Case, however, where Shelton seeks a declaratory judgment that certain of the CPSC's testing policies and procedures are unlawful (Count III), the court concludes a genuine issue of material fact exists on whether the CPSC selects products in a non-random fashion.[21]

From briefing, it would appear that another of Shelton's principal concerns is with the method of selecting products

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[20] The CPSC argues that Mr. Hall's statement is contrary to written CPSC policy. *See* CPSC's NFA Case Opposition Suggestions at 17. The court notes, however, that Dr. Chen's expert report notes that the CPSC's "FY 1996 Fireworks Program" states on page 22 (a page that would appear to have been omitted as an exhibit to the court) that "Normally, the items selected will be those which are most likely to fail testing." Ex. 28 to Shelton' s Fine Case Opposition Suggestions at 5.

[21] The court reserves at this time, however, a ruling on the legality of such a procedure if, in fact, the CPSC does select products that "appear" to violate the Fireworks Regulations. Trial developments may make such a ruling unnecessary. Initial thinking on this matter suggests that it would be unwise for the CPSC to purposely ignore violations that readily present themselves on cursory examination of a shipment (it would be, perhaps, somewhat akin to a U.S.D.A. meat inspector ignoring "green" meat during an inspection).

within the sample for particular tests (*i.e.*, sub-sampling). Shelton argues here that the method by which the CPSC selects sub-samples for the bottle rocket rigidity and straightness tests is not random. Shelton offers no evidence on CPSC's sub-sampling process regarding any other product. This argument, at most, therefore, undermines the CPSC's attempted enforcement action vis-a-vis its banning of bottle rockets based on a failure to satisfy either the rigidity and straightness tests.

From a review of the record, it would appear that products 7, 12, 14, 15, 16 and 18 failed the stick rigidity test; none failed the stick straightness test. But, it further appears that all of these products except for product 14 (the 1995 Moon Travellers shipment discussed above) also failed the "fuse burn" test (and, in the case of product 16, the fuse attachment test) and were thus "banned hazardous substances" anyway (*but see infra*, discussing Shelton's challenges to the fuse burn test).

The CPSC concedes that its technicians select the most crooked and least flexible sticks from each package (ten packages are selected at the first sampling stage) of twelve bottle rockets for the sub-samples used in the straightness and rigidity tests.[22] The issue is therefore whether the CPSC may seek civil penalties against Shelton based on product 14's failure to pass the CPSC's stick rigidity test. In the NFA Case, the issue is whether this methodology should be

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[22] The court concludes that the CPSC's argument that Shelton challenges only a "policy" and not a "rule" elevates form over substance. The CPSC admits that it regularly and routinely selects the least rigid sticks for the sub-sample. The CPSC can not escape judicial scrutiny of this procedure merely because Shelton claims it is a "policy" rather than a rule. *See generally* 5 U.S.C. § 553(b) (notice and comment requirements of the APA do not apply to "interpretative rules, general statements of policy or rules of agency organization, procedure, or practice.").

declared unlawful and the CPSC enjoined from taking action against importers based on such selective sub-sampling.[23] The expert witnesses from the two sides disagree over whether valid statistical inferences may be drawn from the sub-sample where the sub-sample is not randomly selected. The court concludes that this dispute must be resolved at trial.[24]

F. CPSC's Alleged Violation of Shelton's Due Process Rights.

Shelton makes several due process arguments in its various briefs, most with no citation to authority and little analysis or discussion. The court concludes that they all lack merit and will only discuss in this Memorandum and Order two of the arguments the court believes represent Shelton's best arguments.

Shelton argues that its due process rights were violated when the CPSC permitted it to sell five products at issue in the Fine Case and the 1997 shipment of Whistling Moon Travellers because there was no reason to challenge or contest the CPSC findings with respect to those products. *See* Shelton's Fine Case Support Suggestions at 14; Shelton's NFA Case Support Suggestions at 29-30. Merely because Shelton lacked an immediate financial incentive to challenge the CPSC's determination does not mean that its due process rights were violated. Shelton was not told that the CPSC

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[23] Although the CPSC procedure of selecting the most crooked bottle rockets for sub-sampling is not directly at issue in either the Fine or NFA Case (because not one of the products involved failed the straightness test), the disposition of the issue before the court will obviously have some bearing on the straightness test.

[24] Again, however, the court reserves ruling on whether this policy, if it turns out that valid statistical inferences may not be drawn, is nevertheless lawful and permissible.

would not be pursuing these violations in an enforcement proceeding. Shelton still had a remedy (as set forth in the FHSA, the Fireworks Regulations and the LOA's); it just chose not to pursue it.

Shelton also alleges that its due process rights were violated because of the CPSC's failure to provide it with an "opportunity to have [its] case reviewed by an independent Finder-of-Fact." Shelton's Fine Case Opposition Suggestions at 14. *See also* Shelton's NFA Case Support Suggestions at 29-30. Shelton admits that all of the LOA's made reference to submitting evidence objecting to the CPSC's determination.[25] Shelton also concedes that it failed to submit evidence challenging the CPSC's determination in all but one case. And, even though Mr. L. George Gayman, the CPSC Compliance Officer assigned to the region of the country in which Shelton operates, reviewed the laboratory tests to determine whether the product violated the Fireworks Regulations and also reviewed the evidence submitted in opposition to his decision in the one instance, the statute and regulation both indicate that Shelton had the opportunity to pursue the matter further (presumably before someone other than or, at least in addition to, Gayman), including a hearing where testimony could be introduced (*see* 15 U.S.C. § 1273(a) and 16 C.F.R. § 1500.268) and Shelton did not avail itself of this opportunity. Finally, it is the court's impression from briefing and exhibits that once the tests are performed and the results tabulated (a function performed by staff members within the CPSC other than Gayman), whether the Fireworks Regulations are violated is not a matter of discretion with Gayman (although what enforcement action to

[25] 'This is in accordance with the FHSA, 15 U.S.C. § 1273(a), and the Fireworks Regulations, 16 C.F.R. § 1500.268.

take evidently is). In sum, the court can not conclude that Shelton's due process rights were violated in this case.

Accordingly, Shelton's due process arguments are ruled against it as a defense to the Fine Case. Further, summary judgment is appropriate in favor of the CPSC and against Shelton and the NFA on Count V in the NFA Case.

H. The Validity Of The Tests Performed.

Shelton makes a variety of arguments aimed at the validity of the various compliance tests conducted by the CPSC. Two of these arguments, the CPSC's procedure of selecting as samples devices that appear to be violative, and selecting bottle rockets for the straightness and rigidity tests that are the least straight and rigid, are discussed *supra*. The court will address the remaining arguments in the following paragraphs.

Shelton argues that it is not statistically valid to fail an entire shipment of a product when the sample taken does not vary with the number of devices in a particular shipment of a product. Relying on its expert witness, Dr. Jie Chen, it argues that the margin of error increases as the size of the product shipment increases to such an extent that valid statistical inferences may not be drawn. *See* Shelton's Fine Case Opposition Suggestions at 16-17. The CPSC relies upon its expert, Dr. Richard Madsen, to argue that the inferences that can be drawn from the samples are the same regardless of the overall size of a shipment. *See* CPSC's Fine Case Reply Suggestions at 7. Although the CPSC attacks Dr. Chen's analysis as "irrelevant" because it relies upon an erroneous assumption that the CPSC will not reject a shipment of fireworks if statistical inferences based upon the samples indicate that less than 10% of the total population is defective, it is not clear that Dr. Chen's analysis collapses if the percentage is dropped significantly. The court concludes

that this dispute creates a genuine issue of fact that must necessarily be resolved at trial.[26]

Shelton next attacks the fuse burn test, arguing that because a CPSC study revealed human time measurement errors of—2 seconds to .66 seconds (a total range of 1.08 seconds) the CPSC should not fail products that have fuse burn times of 2.7 seconds (below which the CPSC concludes that the sample device being tested failed the fuse burn test), but should instead lower the threshold limit to 2.34 seconds (3.00 seconds minus .66 seconds). *See* Shelton's Fine Case Opposition Suggestions at 17. The court notes that five of the products at issue in the Fine Case failed only the fuse burn test (numbers 2, 3, 9, 11 and 13). Although the court is inclined to give considerable deference to the threshold figure arrived at by the CPSC, this matter is also best left to trial where the issue can be fully fleshed out and the significance of the CPSC's 2.7 second threshold figure analyzed.

Shelton next argues through its expert witness Dr. Roger Schneider that because the fuse burn test regulation is stated in, terms of "3" seconds (not 3.0 or 3.00), *see* 16 C.F.R. § 1507.3(a)(2), any measurement value of 2.51 seconds or higher must be rounded up to 3 seconds. *See* Shelton's Fine Case Opposition Suggestions at 17. Therefore, Shelton argues, the CPSC should not fail products that fall between 2.51 and 2.7 seconds (as it presently does). Because this argument represents an overly technical (and not very sound) reading of the regulation language, the court declines to adopt it.

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[26] The court does note, however, that while six of the products (numbers 7, 12, 14, 15, 16, and 18) contained more than 100,000 individual devices, the remaining products had less than 44,000 devices (and many of those had less than 10,000 devices), and it is not apparent that, even if accepted, Dr. Chen's analysis would render the results reached by the CPSC as to those latter products statistically erroneous.

Shelton argues finally that contrary to the CPSC's conclusion, product 10, "small festival balls," is not a misbranded hazardous substance because it did bear a label. *See* Shelton's Fine Case opposition suggestions at 17 (citing Ex. 10 to CPSC's Fine Case Motion For Summary Judgment at 385, which shows a package warning label). This argument fails to take into account that the CPSC interprets 16 C.F.R. § 1500.14(b)(7)(ix) to require[27], and the LOA indicated, that each individual ball must bear a label, not just the package containing the small festival balls.

I. The Corporate And Individual Distinctiveness Of The Three Importers.

Shelton argues that the CPSC has failed to identify which defendant (Mr. Shelton, Shelton Wholesale, Polaris) violated the FHSA with respect to which of the nineteen products at issue. See Shelton's Fine Case Opposition Suggestions at 13. Shelton argues that because it must be established that the importer knowingly imported a banned or misbranded hazardous substance, the specific importer must be identified and its (or his) knowledge tested.

The CPSC argues that Mr. Shelton is "directly and personally culpable for all of the violations" (or at least derivatively liable) because he controls all aspects of Shelton Wholesale and Polaris, is the sole owner, officer and director of both corporations, co-mingles money, and incorporated Shelton Wholesale and Polaris solely for tax reasons. The CPSC claims that the three defendants are really one, and that Mr. Shelton should not be able to avoid liability by hiding

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[27] Shelton does not argue that this interpretation of 16 C.F.R. § 1500.14(b)(7)(ix) is incorrect. In fact, product 8, another shipment of "small festival balls," was evidently shipped with labels affixed to the individual balls. *See* Ex. 8 to CPSC's Fine Case Motion For Summary Judgment (indicating that product 8 failed only the burnout/blowout test).

behind a corporate shield. The CPSC's argument appears to be that the corporate veils of the corporations should be pierced and that Mr. Shelton should be personally held responsible for the imports of both Shelton Wholesale and Polaris, or that Mr. Shelton is at least derivatively liable based on the wrongful acts of the corporations that he solely owns and controls.[28]

Because the court concludes that summary judgment in favor of Shelton is not appropriate (for reasons previously articulated and for reasons that are articulated *infra*), and because the CPSC has moved for summary judgment on the issue of liability only, the subject of veil piercing and derivative liability is one appropriately reserved for trial. It is apparently uncontroverted that each of the three defendants is responsible for importing at least one of the banned hazardous substances (although whether the products are in fact banned or misbranded hazardous substances is an issue, *see supra*). The invoices attached to the CPSC's motion for summary judgment in the Fine Case reveal that "Polaris Fireworks" imported products 1-7, Shelton Wholesale imported product 13 and Mr. Shelton imported products 8-12 and 14-19. *See* Exs. 1-19 to CPSC's Fine Case Summary Judgment Motion. The only issue with respect to veil piercing and derivative liability, therefore, would appear to be the amount of civil penalties, if any, that should be entered against the respective defendants (*i.e.*, whether Mr. Shelton

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[28] The CPSC does not appear to suggest that Shelton Wholesale should be held responsible for those products imported by Polaris, or vice versa. There is no allegation that Shelton Wholesale and Polaris co-mingled funds, shared bank accounts, etc., although that may come out at trial.

can be held responsible for products imported by Shelton Wholesale and Polaris).[29]

J. "Knowing" Violation of the FHSA.

A person "knowingly" violates the FHSA when the person has "actual knowledge" of a violation or is presumed to have knowledge "deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations." 15 U.S.C. § 1264(c)(5). Having reviewed the arguments of Shelton and the responses by the CPSC, the court concludes that genuine issues of material fact exist which preclude entry of summary judgment in favor of Shelton on this question.

Specifically, the court believes that a trier of fact could conclude that Shelton knowingly violated the Fireworks Regulations by continuing to import the vast majority of its fireworks from a supplier that repeatedly sold it fireworks that failed CPSC compliance tests, and by failing to conduct its own testing (and/or utilizing the services of an independent testing agency) on products it intended to import after some of the products it imported failed CPSC compliance testing. Even though independent testing of

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[29] Although it may ultimately be shown that Mr. Shelton is responsible for all of the products imported (either through application of veil piercing or derivative liability), the court will reserve this issue for trial. *See, e.g., Thomas Berkeley Consulting Engineer, Inc. v. Zerman*, 911 S.W.2d 692, 695 (Mo. Ct. App. 1995) ("To disregard the existence of a corporate entity, the control which the proponent must show is complete domination, not only of the finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own") (internal quotations omitted); *United States v. Park*, 421 U.S. 658, 675-76 (1975) (corporate chief executive officer with power to prevent or correct may be held responsible for corporation's illegal acts).

fireworks products does not guarantee CPSC approval of them, such testing would have provided a strong defense to a claim that a "knowing" violation occurred. On the other hand, a decision not to have products tested after it was apparent that a number of them were not passing CPSC compliance testing, and/or a decision to not search out other, more reputable suppliers, could give rise to an inference that Shelton failed to exercise "due care."

K. Jurisdiction over The NFA Case.

The CPSC argues that the court lacks jurisdiction over the NFA Case. The court has previously ruled this point, albeit on slightly narrower grounds, against the CPSC. Having reviewed its previous order on this argument, *see* April 10, 1997, Memorandum to Counsel at 1-2, the court concludes that its earlier reasoning was sound and declines the CPSC's invitation to revisit the issue.

L. Count IV of the NFA Case Alleging Unjustified Actions And Threats In Excess Of Statutory Authority In Violation of The Administrative Procedure Act.

Shelton and the NFA make no independent defense of Count IV, which claims that the CPSC has taken "unjustified actions and threats . . . in excess of statutory authority" in violation of 5 U.S.C. § 706(2)(A) of the APA, in response to the CPSC's motion for summary judgment. *See generally* Shelton's NFA Case Opposition Suggestions. Nor do they independently support Count IV in their cross-motion for summary judgment. *See generally* Shelton's NFA Case Support Suggestions. There is no evidence in the record tending to support a finding that the CPSC took "unjustified actions and threats" against Shelton. The court has concluded previously that the CPSC has jurisdiction to regulate the fireworks at issue in this case and there is no evidence of any "threats" by the CPSC. Accordingly, summary judgment in favor of the CPSC and against Shelton and the NFA is appropriate on Count IV of the NFA Case complaint.

M. Conclusion.

Accordingly, for the reasons stated, it is hereby

ORDERED that plaintiff United States' motion to exceed page limit in 96-6131-CV-SJ-6 (Doc. No. 72) is granted. The clerk of the court is directed to file the United States' suggestions in opposition to defendants' motion for summary judgment. It is further

ORDERED that defendant Shelton's motion to exceed page limit in 96-6131-CV-SJ-6 (Doc. No. 75) is granted. The clerk of the court is directed to file Shelton's reply suggestions in support of its motion for summary judgment. It is further

ORDERED that defendant CPSC's motion to exceed page limit in 97-6021-CV-SJ-6 (Doc. No. 71) is granted. The clerk of the court is directed to file the CPSC's suggestions in opposition to plaintiffs' motion for summary judgment. It is further

ORDERED that defendant CPSC's motion for summary judgment in the NFA Case (97-6021-CV-SJ-6) is granted with respect to Count I. It is further

ORDERED that defendant CPSC's motion for summary judgment in the NFA Case (97-6021-CV-SJ-6) is granted with respect to Count II. It is further

ORDERED that defendant CPSC's motion for summary judgment in the NFA Case (97-6021-CV-SJ-6) is denied with respect to Count III. It is further

ORDERED that defendant CPSC's motion for summary judgment in the NFA Case (97-6021-CV-SJ-6) is granted with respect to Count IV. It is further

ORDERED that defendant CPSC's motion for summary judgment in the NFA Case (97-6021-CV-SJ-6) is granted with respect to Count V. It is further

ORDERED that plaintiff Shelton's motion for summary judgment in the NFA Case (97-6021-CV-SJ-6) is denied. It is further

ORDERED that defendant Shelton's motion for summary judgment in the Fine Case (96-6131-CV-SJ-6) is denied. It is further

ORDERED that plaintiff United States' motion for summary judgment in the Fine Case (96-6131-CV-SJ-6) is denied.

/s/ _____
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: April 28, 1998

APPENDIX A

PRODUCT #	PRODUCT NAME	CPSC SAMP	DATE ENTER U.S.	FIREWORKS REGULATION VIOLATED (16 CFR)	FAILURE
1	Artillery Shell	P-830-6645	03/31/92	1507.5 (leakage)	7805 mg
2	Crack Can 10 Ball	P-830-6647	03/31/92	1507.3(a)(2) (fuse burn)	1 of 8 too long
3	Flying Dragon and Jumping Tiger	P-830-6648	03/31/92	1507.3(a)(2) (fuse burn)	1 of 8 too short
4	2" Small Display Shells	P-830-6649	03/31/92	1500.17(a)(11)(i) (shell size cannot be grater than 1.75 inches)	2 of 8
	"	"	"	1507.3(a)(2) (fuse burn)	3 of 8 too short
5	Flashing Thunder	P-830-6650	04/01/92	1500.17(a)(3) (amt. of pyrotechnic composition cannot be more than 2 grains [130 mg])_	Avg. 6.7 grains [433 mg]
	"	"	"	1507.3(a)(2) (fuse burn)	1 of 8 too short
	"	"	"	1507.5 (leakage)	82 mg

6	Festival Balls	P-830-6651	04/01/92	1507.5 (leakage)	2941 mg
7	Whis Moon Trav.	P-830-6653	04/07/92	1507.3(a)(2) (fuse burn)	3 of 8 too short
	"	"	"	1507.10 (stick rigidity)	1 of 10
8	Small Festival Balls	S-830-6046	04/12/94	1507.6 (burnout/ blowout)	2 of 8 failed
9	Texas Pop Rocket	S-830-6407	04/25/94	1507.3(a)(2) (fuse burn)	1 of 8 too short
10	Small Festival Balls	S-830-6048	04/25/94	1507.6 (blowout)	1 of 8
	"	"	"	1500.14(b)(7)(ix) (label require-ment)	all balls failed
11	Crackling Art Shell	S-830-6057	05/17/94	1507.3(a)(2) (fuse burn)	1 of 8 too short
12	Air Travel w Report	T-830-6115	12/09/94	1507.3(a)(2) (fuse burn)	2 of 8 too short
	"	"	"	1507.10 (stick rigidity)	1 of 10
13	Master Blasters	T-830-6130	01/19/95	1507.3(a)(2) (fuse burn)	3 of 8 too short
14	Moon Travellers	T-830-6127	01/26/95	1507.10 (stick rigidity)	3 of 10

15	Air Travel w Report	T-830-6128	01/26/95	1507.3(a)(2) (fuse burn)	1 of 8 too short
	"	"	"	1507.10 (stick rigidity)	3 of 10
16	Whis Moon Trav	T-830-6168	06/05/95	1507.3(a)(2) (fuse burn)	2 of 8 too short
	"	"	"	1507.3(b) (fuse attach-ment)	1 of 8
	"	"	"	1507.10 (stick rigidity)	3 of 10
17	Overlord in Sky	T-830-6169	06/05/95	1500.17(a)(3) (amt. of pyro-technic composi-tion cannot be more than 2 grains [130 mg])	Avg. 9.6 grams [629.9 mg]
	"	"	"	1507.3(a)(2) (fuse burn)	2 of 8 too short
18	Whistling Moon Bottle Rocket	96-830-3983	02/29/96	1507.3(a)(2) (fuse burn)	1 of 8 too short
	"	"	"	1507.10 (stick rigidity)	1 of 10

19	Spring Thunder 7 Shots	96-830-4124	03/01/96	1500.17(a)(3) (amt. of pyro-technic composi-tion cannot be more than 2 grains [130 mg])	Ave. 26.4 grains [1731. 4 mg]

APPENDIX H

15 U.S.C. § 1261(q)(1)(B) (2002):

The term "banned hazardous substance" means (A) any toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted; or (B) any hazardous substance intended, or packaged in a form suitable, for use in the household, which the Commission by regulation classifies as a "banned hazardous substance" on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this chapter for that substance, the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce: Provided, That the Commission, by regulation, (i) shall exempt from clause (A) of this paragraph articles, such as chemical sets, which by reason of their functional purpose require the inclusion of the hazardous substance involved or necessarily present on electrical, mechanical, or thermal hazard, and which bear labeling giving adequate directions and warnings for safe use and are intended for use by children who have attained sufficient maturity, and may reasonably be expected, to read and heed such directions and warnings, and (ii) shall exempt from clause (A), and provide for the labeling of, common fireworks (including toy paper caps, cone fountains, cylinder fountains, whistles without report, and sparklers) to the extent that it determines that such articles can be adequately labeled to protect the purchasers and users thereof.

APPENDIX I

16 C.F.R. § 1500.3(c)(10)(i) (2002):

(10) The definition of "misbranded hazardous substance" in section 2(p) of this act (restated in paragraph (b)(14) of this section) is supplemented by the following definitions or interpretations of terms used therein:

> (i) Hazardous substances intended, or packaged in a form suitable, for use in the household means any hazardous substance, whether or not packaged, that under any customary or reasonably foreseeable condition of purchase, storage, or use may be brought into or around a house, apartment, or other place where people dwell, or in or around any related building or shed including, but not limited to, a garage, carport, barn or storage shed. The term includes articles, such as polishes or cleaners, designed primarily for professional use but which are available in retail stores, such as hobby shops, for nonprofessional use. Also included are items, such as antifreeze and radiator cleaners, that although principally for car use may be stored in or around dwelling places. The term does not include industrial supplies that might be taken into a home by a serviceman. An article labeled as, and marketed solely for, industrial use does not become subject to this act because of the possibility that an industrial worker may take a supply for his own use. Size of unit or container is not the only index of whether the article is suitable for use in or around the household; the test shall be whether under any reasonably foreseeable condition of purchase, storage, or use the article may be found in or around a dwelling.